Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

BARRY WARREN KIBBE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office and P. O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3385

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
Of Counsel

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ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

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BARRY WARREN KIBBE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Robert J. Henderson, Superintendent of Auburn Correctional Facility, Auburn, New York, prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, dated April 8, 1976, which granted respondent Kibbe's habeas corpus application to the extent of reversing his conviction for second degree murder. This decision reversed the judgment of the United States District Court for the Northern District of New York, dated June 27, 1975, which denied the application.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is reproduced herein as Appendix "A" (1a-17a). The amendment to the judgment and opinion is not yet reported

and is reproduced herein as Appendix "B" (18a-19a). The opinion of the District Court is unreported and is reproduced herein as Appendix "C" (20a-23a).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 8, 1976. A timely petition for rehearing or rehearing *en banc* was denied on May 21, 1976.

Question Presented

1. Did the Court of Appeals err in reversing a state murder conviction on the basis of an alleged omission in the jury instruction when the Court did not evaluate the instruction in the context of the entire proceeding, as required by fundamental principles of habeas corpus review as well as prior decisions of this Court.

State Statute Involved

New York Penal Law:

"§ 125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

• • •

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person;"

Statement of the Case

A. Introduction

Petitioner is presently confined pursuant to a judgment of conviction for the crimes of murder in the second degree, robbery in the second degree, and grand larceny in the third degree, rendered by the Monroe County Court after a trial by jury. Petitioner was sentenced to 15 years to life on the murder count, 5-15 years on the robbery count, and up to 4 years on the grand larceny count. His conviction was affirmed, with opinion, by the Appellate Division, *People* v. *Kibbe*, 41 A D 2d 228, 342 N.Y.S. 2d 386 [4th Dept. 1973], and the Court of Appeals. 35 N Y 2d 407, 362 N.Y.S. 2d 848, 321 N.E. 2d 773 (1974).

B. The Crime

On December 30, 1970, the victim of this crime, one George Stafford, was drinking heavily in a Rochester bar with petitioner and his co-defendant, Roy Krall. Stafford inquired if anyone would give him a ride and petitioner and Krall, who had already decided to steal his money, agreed. After another few drinks in another bar, they entered petitioner's car at approximately 9:30 P.M.

While Krall drove, petitioner slapped Stafford several times and took his money. Petitioner made Stafford lower his trousers and take off his boots to prove that he had no more money. Stafford was then abandoned on the shoulder of a rural, two lane road, snow-banked on both sides. Stafford, still partially undressed, was left with his jacket and boots next to him; his eyeglasses remained in the car. The temperature was near zero and gusting winds at times obscured visibility, although it was not snowing. The road was not lighted and there were no nearby houses. The nearest structure was an open gasoline station approximately one quarter of a mile away on the other side of the highway.

William Blake, operating a pickup truck, was driving at 50 miles per hour, 10 miles over the speed limit, when two approaching cars flashed their headlights at him. Immediately thereafter he saw Stafford sitting in the middle of the road. Blake went into shock and did not have time to react; he hit Stafford. He stopped to aid Stafford, who was not wearing his jacket or boots. Stafford died shortly thereafter of massive head injuries. Tests revealed a high degree of intoxication.

C. The Trial and Charge

Petitioner and his co-defendant were indicted, *inter alia*, for murder in the second degree, N.Y. Penal Law § 125.25 (2), which provides that a person is guilty of murder when:

> "2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

In his opening statement, the prosecutor specifically argued that defendants' acts, while not the sole cause of death, were nonetheless responsible for and a cause of death. (T. 607-608).* The jury had been instructed by the judge that the opening statement was to be considered a preview of what each side intends to prove.

The trial strategy of the defense was:

> ". . . to demonstrate that the immediate and culpable cause of Stafford's death was Blake's operation

* Numbers in parentheses preceded by the letter "T" refer to the state trial transcript. The relevant portions of the transcript have been filed with the Clerk of this Court.

> of his truck and not the defendants' conduct." Court of Appeals Opinion, a.*

To this end defense counsel conducted a vigorous cross-examination of Blake and the Medical Examiner (see 7a). Additionally, counsel had made a pre-trial motion to dismiss the indictment on the ground of inadequate causation; the motion was renewed at the close of the prosecution's case (see 7a-8a). The motions were denied.

The trial court instructed the jury that the arguments of counsel were "advanced for your help in reaching a fair and just verdict" and could be followed by the jury as long as they were based on evidence received (T. 1173). In his summation petitioner's counsel repeated and accented the elements of second degree murder (T. 1094). Co-defendant's counsel argued that if there were any depraved indifference to human life it was on the part of Blake, who "caused" Stafford's death (T. 1117-1118). Counsel described Blake's conduct and said "There you have the cause of death." (T. 1118). See also T. 1125.

In his summation the prosecutor repeatedly argued that defendants' reckless conduct caused Stafford's death (T. 1132-1134, 1155) and that defendants could have anticipated the risk of death by a vehicle (T. 1152-1155). He further argued that these acts caused Stafford's death even though there "were not the only, the direct or most preceding cause of his death" and gave an example of an intervening cause which would not negate the original actor's responsibility for ensuing death (T. 1155-1157).

The jury was then charged by the trial judge. The Court reread the indictment. The count charging second degree murder tracked the language of § 125.25(2) of the

* Numbers followed by the letter "a" refer to the pages of the appendices annexed hereto.

Penal Law (T. 1162). The Court also stated that the jury could follow the arguments of counsel in reaching its verdict, as long as they were based on evidence received (T. 1173). The Court defined the terms "recklessly," "depraved," "grave," and "indifferent" (T. 1187-1189) but did not specifically define "cause." The jury was instructed that to convict the defendants of a crime, "all" elements of the crime must be proved beyond a reasonable doubt (T. 1189). Immediately after this instruction, the judge reiterated the elements of second degree murder (T. 1190). In briefly summarizing the evidence, the judge pointed to evidence regarding the "death or running into of George Stafford in the East River Road by an automobile—truck or light truck" (T. 1197).

Additionally, upon its own request, the jury was given a copy of the indictment so it would have all the language of the various counts before it (T. 1209; see T. 1204-1206). As previously stated, the indictment followed the language of the statute. The judge stated:

> "This copy of the indictment is given to you only so you can see what words are used and the different counts and consider whether the evidence as you find it has met the burden of proof of which I advised you." (T. 1209).

When the jury returned a few hours later and requested an explanation of all four counts, the Court repeated the exact language of § 125.25(2) and said:

> "*All* of these factors must coincide to render a person guilty of murder under that section." (T. 1916) (emphasis added).

Petitioner was apparently satisfied that the issue of causation was sufficiently and properly before the jury since he made no objection to the charge and made no request for a separate instruction on causation.

D. Prior State Proceedings

Petitioner's judgment of conviction was affirmed on appeal. Petitioner's brief to the Appellate Division did not challenge the jury charge. Petitioner simply argued that there was insufficient evidence to support a conviction for murder in the second degree, contending that the victim's death was caused by the truck driver, not petitioner. The dissenting judge in the Appellate Division *sua sponte* raised the issue of the jury charge on causation and held that he would reverse in the interest of justice (N.Y. Crim. Proc. Law § 470.15[3][c], [6][a]) because the instruction was inadequate. *People* v. *Kibbe, supra,* 41 A D 2d at 230-233. Because of this dissent the majority considered the charge in the "interest of justice" and held the charge adequate although lacking in detail, noting that petitioner had not objected at trial, made any request at trial, nor challenged the charge on appeal. *Id.* at 230.

The Court of Appeals refused to disturb the Appellate Division's discretionary determination that the conviction would not be reversed in the interest of justice, also noting that no exception or request with respect to the charge on causation had been made in the trial court. *People* v. *Kibbe, supra,* 35 N Y 2d at 413-414.

E. Federal Proceedings

Petitioner's habeas corpus application to the United States District Court for the Northern District of New York was denied on June 27, 1975 (20a-23a). As to the challenge to the jury instructions, the Court held that the claim did not raise a question of federal constitutional dimensions (21a).

In a two-one decision dated April 8, 1976, the Court of Appeals reversing, granting the writ as to the murder con-

viction (1a-17a).* The majority of the panel reasoned that the failure of a trial court to adequately instruct a jury on any element of the crime deprives the defendant of his right to have the jury apply the reasonable doubt standard to that element and make a finding that the proof on that element is sufficient beyond a reasonable doubt (9a-13a).

The majority did not evaluate the challenged instruction within the context of the entire charge and the entire trial as required by this Court's decision in *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). Indeed, although *Cupp* was not even cited by the Court, the Court specifically disavowed this approach, since it refused to assess the contested instruction in light of the evidence before the jury and the arguments of counsel, while recognizing that they raised the issue of causation (7a-8a, 10a, n.5).

Rather, the Court faulted the trial judge for his failure to define causation when he defined the other elements of the crime. The Court speculated that the jury may have concluded that the issue of causation may not have been before it or that it could infer causation from the chronological sequence of events (10a). Alternatively, even if the jury were aware of its duty to determine causation, the majority thought that the instruction was inadequate to the task because the legal standard was complex (10a-12a). The Court reasoned that with a proper instruction as to intervening and supervening cause, that is, foreseeability, the jury might have found that petitioner did not foresee or could not have foreseen that the victim would have been struck by a truck (13a).

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* Petitioner also claimed that certain evidence admitted at trial should have been suppressed. Assuming *arguendo* the issue cognizable on habeas corpus (see *Wolff* v. *Rice*, 44 U.S.L.W. 3485 [March 2, 1976]), the Court held that it was without merit (3a, n.1).

The dissent (14a-17a) held that the challenged charge did not reach constitutional dimensions entitling the petitioner to habeas corpus relief. Against the background of the summations and the overall charge, the dissent found that the jury was plainly aware of the necessity of finding that petitioner's conduct was the cause of death, although it may not have been the only cause. "In these circumstances the court's instruction was sufficient to enable the jury intelligently to go about its business." (16a). Accordingly, the absence of a more definitive instruction on the element of causation did not raise an issue of fundamental fairness sufficient to reverse a state conviction in a federal habeas corpus proceeding.

Reasons for Granting the Petition for Certiorari

A. The Court of Appeals' refusal to evaluate the challenged jury instruction in the context of the trial and the entire charge is in direct conflict with decisions of this Court and that circuit.

Ordinarily, a challenge to a jury instruction given in a state criminal trial will not be reviewed by the federal courts. *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *United States ex rel. Stanbridge* v. *Zelker*, 514 F. 2d 45, 50 (2d Cir. 1975); *United States ex rel. Smith* v. *Montanye*, 505 F. 2d 1355, 1359 (2d Cir. 1974); *Schaefer* v. *Leone*, 443 F. 2d 182, 184 (2d Cir.), *cert. den.* 404 U.S. 939 (1971).

The only exception to the rule is a case in which the fundamental fairness of the entire proceeding was infected by the contested instruction. E.g. (*Cupp* v. *Naughten* [*"Cupp"*], 414 U.S. 141, 147 [1973]), for example, where the instruction shifted the prosecution's burden of proof or undermined the presumption of innocence (see *post* at 12-13). The exceptional case can be made out only by analyzing the instruction under the precise standard set forth by this Court in *Cupp*. In the instant case the Court of Appeals failed to make such an analysis.

This Court's mandate in *Cupp* was clear:

> "In determining the effect of this instruction on the validity of respondent's [state] conviction, we accept at the outset the well-established proposition that a single instruction may not be viewed in artificial isolation but must be viewed in the context of the overall charge. *Boyd* v. *United States,* 271 U.S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States,* 409 U.S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus, not only is the challenged instruction but one of many such instructions, but the process of instruction is but one of many components of the trial which may result in the judgment of conviction." *Cupp,* 414 U.S. at 147.

Accord, United States v. *Park,* 421 U.S. 616, 44 L. Ed. 2d 489, 502-503 (1975). See *Boyd* v. *United States,* 271 U.S. 104, 107 (1926).*

Indeed, the Court of Appeals for the Second Circuit has enunciated this same rule with regard to its own appeals. E.g. *United States* v. *Evans,* 484 F. 2d 1178, 1187-1188 (2d Cir. 1973); *United States* v. *Adreadis,* 366 F. 2d 423, 434 (2d Cir. 1966). Certainly state convictions cannot be measured by any stricter test on collateral federal review. Cf. *Henderson* v. *Morgan,* —— U.S. ——, 44 U.S.L.W. 4910, 4914 (June 17, 1976) (REHNQUIST, J.,

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* Conversely, recognition that a jury will consider the entire proceeding, despite instructions to the contrary, was the basis for this Court's holding in *Bruton* v. *United States,* 391 U.S. 123 (1968).

dissenting) (". . . certainly no more stringent a standard could be applied as a matter of constitutional law on federal habeas review of state convictions [than in federal cases]").

In the instant case the Court of Appeals effectively disavowed the holding of *Cupp* (which the majority did not even cite) since it refused to evaluate the challenged charge in the context of the entire proceeding but rather considered it in isolation. This was so despite the Court's stated recognition that the defense cross-examination as well as the summations raised the issue of the cause of the victim's death (7a-8a, 10a, n.5).

The issue of causation was raised by the prosecutor in his opening statement and by both the defense counsel and the prosecutor in their summations, as well as by the evidence before the jury. Additionally, the jury had the indictment (which tracked the language of the statute) before it and was instructed by the trial court that it must find every element against petitioner beyond a reasonable doubt (*ante* at 4-6). Accordingly, had the majority evaluated the allegedly ailing instruction in light of the evidence, arguments of counsel, and the overall charge, it would have been apparent that the jury's attention was adequately focused on the necessity of finding that petitioner's acts caused the victim's death.* See *United States* v. *Park, supra,* 44 L. Ed. 2d at 502. As the dissent stated: "the court's instruction was sufficient to enable the jury intelligently to go about its business." (16a). See *Lyons* v. *Oklahoma,* 322 U.S. 596, 601 (1944) (Specificity of state

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* Here, as in *Boyd* v. *United States, supra,* 271 U.S. at 107-108, petitioner's counsel (whose competency is unchallenged) raised no objection to the charge as given and made no requests, nor did he challenge the charge in his brief to the Appellate Division. The charge was obviously regarded as satisfactory to put the issue before the jury.

court charge is a matter of state procedure as long as it fairly raises the issue).

The Court of Appeals' decision should be reviewed because it is in direct conflict with this Court's holdings as well as its own decisions. The decision establishes bad precedent for future review of challenged jury instructions, particularly in federal habeas review of state convictions where the yardstick for measuring due process claims is fundamental unfairness. See Point B, *post*.

B. The opinion of the Court of Appeals conflicts with and undermines the rule that a state petitioner must show fundamental unfairness to prevail in a federal habeas corpus proceeding.

The yardstick for measuring a due process challenge to a state criminal trial is the "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). The jury instruction test propounded by this Court in *Cupp* is precisely adapted to this end. It requires that the challenged instruction be evaluated in the context of the whole proceeding to ascertain if it "so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147. See also *Pleas* v. *Wainwright*, 441 F. 2d 56, 57 (5th Cir. 1971); *Byrd* v. *Hopper*, 402 F. Supp. 787, 788 (N.D. Ga. 1975); *United States ex rel. Birch* v. *Fay*, 190 F. Supp. 105, 107 (S.D.N.Y. 1961).

In fact, those cases which have reached this Court have involved specific instructions by the trial judge on the issues of presumption of innocence or burden of proof, matters which clearly might affect the fundamental fairness of a criminal trial. In *Cupp*, the challenged portion of the charge was a "presumption-of-truthfulness" instruction which petitioner claimed shifted the State's burden to prove guilt beyond a reasonable doubt. 414 U.S. at 142-145. Similarly, in *Cool* v. *United States*, 409 U.S. 100

(1972), a charge that an accomplice's testimony should be credited if believed beyond a reasonable doubt was challenged and sustained on the ground that it collided with the presumption of innocence and lessened the Government's burden of proof. *Id.* at 104.•

Since the federal habeas courts review only for violations of federal constitutional standards and not to retry cases *de novo* (*Milton* v. *Wainwright*, 407 U.S. 371, 377 [1972]; *Schaefer* v. *Leone*, *supra*, 443 F. 2d at 184), the Court of Appeals evaluation of the challenged charge in "artificial isolation" (*Cupp*, 414 U.S. at 147) not only conflicts with this Court's earlier decisions but also undermines fundamental principles of habeas corpus review.

The erosion of the fundamental unfairness standard in habeas review is an injustice to the federal judiciary as well as to the States. The decision of the majority opens the doors of the federal habeas courts to hundreds of state prisoners who can now claim that the charge in their trials contained a defective or inadequate instruction on a material element of the crime, and that accordingly, that element of the crime was not properly before the jury for a finding beyond a reasonable doubt. That few of these petitioners might prevail is of little moment to the courts who must decide the cases, or to the state attorneys who must read the transcripts and file a response. Cf. *Schaefer* v. *Leone*, *supra*, 443 F. 2d at 184.

In the instant case, the lack of detail by the trial court on the word "cause", conceded by the state appellate courts (*People* v. *Kibbe*, 41 A D 2d at 230; 35 N Y 2d at 414), raises at most a question of state law error. In no event

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• In *United States* v. *Park*, *supra*, 44 L. Ed. 2d 489 and *Boyd* v. *United States*, *supra*, 271 U.S. 104, this Court was acting in its supervisory authority over the federal courts in reviewing other types of charges given in federal trials.

is this a case in which an error has fatally infected the trial, "necessarily" preventing a fair trial. *Lisenba* v. *California, supra,* 314 U.S. at 236. The failure of the Court of Appeals to evaluate the challenged instruction in the context of the entire trial and its concomitant failure to analyze for fundamental unfairness in the trial is a disservice to the basic principles governing the application of the Due Process Clause and to the tenets underlying habeas corpus jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York, June 30, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
of Counsel

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, April 8, 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 554—September Term, 1975.

(Argued January 16, 1976 Decided April 8, 1976.)

Docket No. 75-2128

BARRY WARREN KIBBE,

Petitioner-Appellant,

—v—

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

Before:

LUMBARD, SMITH and MANSFIELD,

Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York, James T. Foley, *Chief Judge,* denying petition for habeas corpus. Petitioner claims that trial judge's incomplete instructions to jury constitute a denial of due process.

Reversed.

SHEILA GINSBERG, Esq., New York, New York
(William J. Gallagher, Esq., The Legal Aid

Society, Federal Defender Services Unit, New York, New York, on the brief), *for Petitioner-Appellant.*

BARBARA SHORE RESNICOFF, Assistant Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General of the State of New York and Samuel A. Hirshowitz, First Assistant Attorney-General, on the brief), *for Respondent-Appellee.*

LUMBARD, *Circuit Judge:*

After a jury trial in New York's Monroe County Court, Barry Warren Kibbe was found guilty on November 30, 1971 of murder, robbery in the second degree and grand larceny in the third degree. He brings this appeal from an order of the Northern District denying his petition for habeas corpus which was sought, in part, because the trial judge failed to charge the jury with respect to causation of death on the murder count. The bizarre circumstances that prompted Kibbe's apprehension and conviction for murder present one of those rare cases in which a habeas corpus petition pursuant to 28 U.S.C. §2254 genuinely puts at issue the guilt or innocence of an accused. See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 250-75 (1973) (Powell, *J.*, concurring); *Ralls* v. *Manson,* 503 F.2d 491, 494-99 (2d Cir. 1974) (Lumbard, *J.*, concurring). We hold that the trial judge's instructions permitted the jury, in its fact-finding process to disregard Kibbe's colorable claim that, as to the murder charge, his actions had not caused the death of a decedent and thus violated Kibbe's constitutional right to have every element of the crime with which he was charged proven beyond a reasonable

doubt. We therefore grant the writ with respect to the murder count.[1]

Kibbe and his codefendant, Roy Krall, met the decedent, George Stafford, at a bar in Rochester, New York on the evening of December 30, 1970. Stafford had been drinking heavily and by about 9:00 p.m. he was so intoxicated that the bartender refused to serve him further. Apparently the defendants saw Stafford offer a one hundred dollar bill for payment, which the bartender refused. At some point during the evening, Stafford began soliciting a ride to Canandaigua from the other patrons in the bar. Kibbe and Krall, who confessed to having already decided to rob Stafford, offered a ride and the three men left the bar together. Before starting out for Canandaigua, the three visited a second bar. When the bartender at this bar also refused to serve Stafford because of his inebriated condition, the three proceeded to a third bar, where each was served additional drinks.

Kibbe, Krall and Stafford left for Canandaigua in Kibbe's car about 9:30 that evening. According to statements of the defendants, as Krall was driving the car, Kibbe demanded Stafford's money and, upon receiving it, forced Stafford to lower his trousers and remove his boots to prove he had no more. At some time between 9:30 and 9:40 p.m., Stafford was abandoned on the side of a unlit, rural two-lane highway. His boots and jacket were also placed on the shoulder of the highway; Stafford's eyeglasses, however, remained in the car. There was testimony that it was "very cold" that night and that strong

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1 Kibbe also claims that the writ should issue because certain evidence admitted at trial was seized in violation of the Fourth Amendment proscription against unreasonable seizures. Even if Fourth Amendment claims are cognizable on habeas corpus, a matter presently before the Supreme Court, see *Wolff* v. *Rice,* 44 U.S.L.W. 3485 (U.S. March 2, 1976), we would find this claim to be without merit.

winds were blowing recently fallen snow across the highway, although the night was clear and the pavement was dry. There was an open and lit service station in the general vicinity, but testimony varied as to its precise distance from the place where Stafford was abandoned. In any case, the station was no more than one-quarter of a mile away.

About half an hour after Kibbe and Krall had abandoned Stafford, Michael Blake, a college student, was driving his pickup truck northbound on the highway at 50 miles an hour, ten miles per hour in excess of the posted speed limit. A car passed Blake in a southbound direction and the driver flashed his headlights at Blake. Immediately thereafter, Blake saw Stafford sitting in the middle of the northbound lane with his hands in the air. Blake testified that he "went into a kind of shock" as soon as he saw Stafford, and that he did not apply his brakes. Blake further testified that he did not attempt to avoid hitting Stafford because he "didn't have time to react." After the collision, Blake stopped his truck and returned to assist Stafford, whereupon he found the decedent's trousers were around his ankles and his shirt was up to his chest. Stafford was wearing neither his jacket nor his boots.

Stafford suffered massive head and body injuries as a result of the collision and died shortly thereafter. An autopsy revealed a high alcohol concentration of .25% in his blood. The Medical Examiner testified that these injuries were the direct cause of death.

Kibbe and Krall were apprehended on December 31, 1970. They were tried for robbery and for the murder of Stafford under New York Penal Law §125.25(2) which provides:

A person is guilty of murder in the second degree when:

* * *

(2) Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.[2]

In his charge to the jury, the judge failed to define or explain the issue of causation as that term is used in §125.25(2). No mention was made of the legal effect of intervening or supervening cause. Nevertheless, defense counsel failed to take any exception whatsoever to this omission. The jury returned guilty verdicts on the charges of second degree murder, second degree robbery, and third degree grand larceny. Kibbe was sentenced to concurrent terms of imprisonment of 15 years to life on the murder conviction, 5 to 15 years on the robbery conviction, and up to 4 years on the grand larceny conviction.

The Appellate Division affirmed the conviction on finding that there was sufficient evidence that Stafford's death was caused by appellant's acts "as well as by the acts of Blake." The court stated that while the trial judge's charge concerning causation was "lacking in detail" appellant had not questioned the sufficiency of the charge on appeal and no exceptions to or requests for a charge on causation had been made at trial. *People* v. *Kibbe*, 41 App. Div. 2d 228 (4th Dept. 1973). Justice Cardamone dissented on the ground that the issue of causation should have been submitted to the jury. The New York Court of Appeals also found sufficient evidence of causation and unanimously affirmed the convictions. *People* v. *Kibbe*, 35 N.Y.2d 407

2 Intent to kill is not a requirement under the statute.

(1974). Although the sufficiency of the charge was argued before the Court of Appeals, the court held that it was within the Appellate Division's discretion to refuse to reverse on those grounds.

Kibbe then petitioned for habeas corpus in the District Court for the Northern District. Judge Foley denied the petition and, on the question of the jury charge, noted that the correctness of instructions does not raise a constitutional claim cognizable on habeas corpus.[3] Appeal to this court followed.

Deliberate Bypass

The state appellate courts declined to consider the sufficiency of the trial judge's charge because appellant failed at trial to take an exception to or make a request for an instruction respecting causation. Mindful of the limited role that federal courts must play in reviewing the convictions of state prisoners, we may inquire further regarding Kibbe's claims only if his omission did not constitute a deliberate bypass of the orderly procedures of the state courts.[4] *Fay* v. *Noia*, 372 U.S. 391 (1963).

This court has not hesitated to find a deliberate bypass that precludes federal habeas corpus relief when failure to make a contemporaneous objection, mandated by the state's valid procedural rules, comported with trial strat-

3 Judge Foley cited *United States ex rel. Mintzer* v. *Dros*, 403 F.2d 42 (2d Cir. 1967) for this proposition. In that case, however, the court held only that the specific objections there at issue failed to raise questions of constitutional dimension.

4 The interest of the state in protecting its procedural rules seems somewhat diminished here by the fact that on this appeal the Attorney General of New York has not even argued or briefed the theory that Kibbe deliberately bypassed his right to object to the trial judge's charge. See Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact Finding Responsibility, 75 Yale L.J. 895, 961-62 (1966).

egy contrived by the defendant and his counsel. See *United States ex rel. Terry* v. *Henderson*, 462 F.2d 1125 (2d Cir. 1972); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972); *United States ex rel. Schaedel* v. *Follette*, 447 F.2d 1297 (2d Cir. 1971). In *Cruz*, for instance, where appellant had failed at trial to object to the admissibility of an allegedly coerced confession, the court determined that it was the deliberate and consistent trial strategy of the defense not to question the voluntariness of the defendant's statement. 448 F.2d at 673. It was found that questioning the validity of the confession would have conflicted with the defense tactic of conceding the defendant's act but asserting the existence of mitigating circumstances. Thus, the deliberate bypass of a contemporaneous objection precluded later habeas relief.

This case, however, presents a wholly different situation. It is clear from the 1300 pages of pre-trial and trial transcript that the defense strategy was to demonstrate that the immediate and culpable cause of Stafford's death was Blake's operation of his truck and not the defendants' conduct. Prior to commencement of trial, Kibbe's counsel unsuccessfully moved to dismiss the indictment on the ground that the grand jury testimony dealing with the murder count revealed that defendants had left Stafford off the road and that he had been killed by a collision in the middle of the highway. Counsel for both Kibbe and Krall cross-examined Blake extensively on the speed he was traveling, the weather and road conditions, and his reactions after he spotted Stafford in front of him. The attorneys also vigorously questioned the Medical Examiner to establish that the collision was the immediate cause of Stafford's death. At the close of the prosecution's case, counsel renewed the motion to dismiss the murder count. Attorneys for both Kibbe and Krall argued the motion in

terms of the prosecution's failure to demonstrate the necessary causation. Krall's attorney stated:

> It's our contention that the People's proof has failed to prove the guilt of the defendant beyond a reasonable doubt as a matter of law in connection with that count. The proof had been shown that the cause of death of this [decedent] was severe injuries sustained through being struck by an automobile which the driver of which testified to operating it at a speed of 50 miles an hour in a 40-mile an hour zone. That he saw this form on the roadway when a hundred, two hundred feet away and made no effort to avoid it because, as he said, he was shocked and therefore did not apply the brakes and did not swerve his wheels in an effort to avoid this man. The defendant Roy Krall was under no obligation to anticipate a result like that.

Kibbe's attorney joined in the motion with a similar argument. The motion to dismiss was renewed and denied once more at the close of the entire case.

In their summations to the jury, defense counsel again argued that insufficient proof of causation required a judgment of acquittal on the murder charge. Kibbe's counsel maintained that the evidence failed to demonstrate that Stafford was left in a helpless condition and that some of the indications of helplessness, e.g., the disarray of his clothing, may have been caused by the impact of the collision.

These constant references to causation indicate that Kibbe sought to convince the court and jury that his conduct was not the culpable factor in Stafford's death. Nevertheless, no objection was taken to the trial judge's failure to charge the jury on the question of causation. In light of the conscious trial strategy of the defense,

however, we believe that this omission was obviously inadvertent and does not constitute a deliberate bypass. See *United States ex rel. Schaedel* v. *Follette,* 447 F.2d 1297, 1300 (2d Cir. 1971). We therefore proceed to consider the merits of appellant's petition.

Error in the Instruction

Kibbe now contends that the question of causation was a pivotal issue at trial and that the judge's failure to instruct the jury with respect to that issue allowed the jury to convict without finding that every element of the crime had been proven beyond a reasonable doubt. On the limited and singular facts of this case, we agree.

In order to satisfy the constitutional requirements of due process, a criminal conviction must be supported by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship,* 397 U.S. 358, 364 (1970). It is the essence of a fair trial and of the right to jury trial that the jury apply the reasonable doubt standard to determine those issues of fact that bear on the elements of the offense, see *United States* v. *Screws,* 325 U.S. 91, 107 (1945); *United States* v. *Hayward,* 420 F.2d 142 (D.C. Cir. 1969), and presumably it is in accordance with this mandate that New York requires the trial judge to state to the jury "the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts . . . ." N.Y.C.P.L. §300.10 (McKinney 1971). See *People* v. *Walker,* 198 N.Y. 329, 334 (1910) (every essential element of a crime presents a question of fact for the jury's exclusive determination).

In this case, by the language of the statute, the state was bound to prove to the jury beyond a reasonable doubt that appellant evinced a depraved indifference to Staf-

ford's life, recklessly engaged in conduct that created a grave risk of Stafford's death, and thereby caused Stafford's death. The court scrupulously instructed the jury with respect to the meaning of "recklessly", "depraved", "grave", and "indifferent" as used in Penal Law §125.25(2). The omission of any definition of causation, however, permitted the jury to conclude that the issue was not before them or that causation could be inferred merely from the fact that Stafford's death succeeded his abandonment by Kibbe and Krall.

Even if the jury were aware of the need to determine causation,[5] the court's instruction did not provide the tools necessary to that task. The possibility that jurors, as laymen, may misconstrue the evidence before them makes mandatory in every case instruction as to the legal standards they must apply. See *United States* v. *Burse*, Docket

5 The trial judge made brief mention of the term "causation" in his charge when he stated: "You will not consider either (first degree manslaughter or second degree manslaughter) unless you feel that these defendants or either of them, was guilty of causing the death of George Stafford recklessly." This instruction, however, was given in the context of explaining the relation between reckless conduct and manslaughter rather than in the context of a definition of causation. In fact, by emphasizing "recklessly", the judge may have implied that the jury could assume causation and had only to determine whether recklessness was involved.

The above recounting of numerous instances in which the defense attempted to shift responsibility for Stafford's death away from appellant suggests that the jury may have been aware of the necessity of finding that appellant's conduct was the cause of that death. The motions to dismiss for failure of the prosecution to demonstrate causation, however, were made outside the presence of the jury; although the defense also raised the causation question in summations, Kibbe's counsel began his summation by noting that his remarks did not constitute evidence and that the trial judge alone was responsible for instructing the jury regarding the law. In the absence of an instruction concerning causation, the jury was unlikely to make the inference that it was to determine the question of causation from hearing the statute read and from listening to the defense examination of witnesses. In any event, there was no detailed definition of causation commensurate with the definitions of other terms in the statute.

No. 75-1388 (2d Cir. Mar. 8, 1976), slip op. at 2509. Error in the omission of an instruction is compounded where the legal standard is complex and requires that fine distinctions be made. That is most assuredly the situation in this case. It has been held that where death is produced by an intervening force, such as Blake's operation of his truck, the liability of one who put an antecedent force into action will depend on the difficult determination of whether the intervening force was a sufficiently independent or supervening cause of death. See W. LaFave & A. Scott, Criminal Law 257-63 (1972) (collecting cases).[6] The few

6 The complexity of the definition of legal causation in LaFave and Scott, supra, demonstrates that an explanation of the concept of intervening and supervening cause would have been not merely helpful (as contended by Judge Mansfield), but essential to the jury's determination here. Given the proper standard for causation, the jury could have found that Blake had been so reckless as to absolve defendants of legal responsibility for Stafford's death:

> As might be expected, courts have tended to distinguish cases in which the intervening act was a *coincidence* from those in which it was a *response* to the defendant's prior action. An intervening act is a *coincidence* when the defendant's act merely put the victim at a certain place at a certain time, and because the victim was so located it was possible for him to be acted upon by the intervening cause. The case put earlier in which B, after being fired upon by A, changed his route and then was struck by lightning is an illustration of a coincidence. However, it is important to note that there may be a coincidence even when the subsequent act is that of a human agency, as where A shoots B and leaves him lying in the roadway, resulting in B being struck by C's car; or where A shoots at B and causes him to take refuge in a park, where B is then attacked and killed by a gang of hoodlums.
>
> By contrast, an intervening act may be said to be a *response* to the prior actions of the defendant when it involves a reaction to the conditions created by the defendant.
>
> Thus—though the distinction is not carefully developed in many of the decided cases—it may be said that a coincidence will break the chain of legal cause unless it was foreseeable, while a response will do so only if it is abnormal (and, if abnormal, also unforeseeable).
>
> • • •
>
> This kind of accident must be distinguished from a somewhat different situation, as where A, with intent to kill B, only wounds

cases that provide similar factual circumstances suggest that the controlling questions are whether the ultimate result was foreseeable to the original actor and whether the victim failed to do something easily within his grasp that would have extricated him from danger.[7]

The New York appellate courts applied these standards and found that there was sufficient evidence to uphold the convictions. We have no reason to doubt that conclusion. There was evidence that Kibbe and Krall left Stafford near traffic and in an intoxicated condition without eyeglasses or sufficient clothing on a winter evening, and all of this could be considered to determine causation. The sufficiency of the evidence, however, is not the subject of our inquiry. Our sole concern is whether the jury was adequately instructed in order to make the same finding beyond a reasonable doubt. As this function was within

B, leaving him lying unconscious in the unlighted road on a dark night, and then C, driving along the road, runs over and kills B. Here C's act is a matter of coincidence rather than a response to what A has done, and thus the question is whether the subsequent events were foreseeable, as they undoubtedly were in the above illustration.[73]

[73] *People* v. *Fowler*, 178 Cal. 657, 174 P. 892 (1918). Perhaps if C were driving in a reckless way, A would not be liable. If A in the Fowler case had merely an intent to injure, but not to kill, A would be guilty of manslaughter; but no doubt A, having put B in an unconscious or helpless position on a dark road, has an affirmative duty to act to pull him off the road, and failure to act under the circumstances where A knows death is substantially certain to occur (or even where he realizes there is a very high risk though no certainty of such death) should make him guilty of murder of the intent to kill (or of the depraved heart) variety.

Without a proper definition of causation, the jury, if it considered causation at all, could have found that Blake's conduct, no matter how reckless, could merely supplement and not supervene defendants' culpability.

7 See *State* v. *Preslar*, 38 N.C. Rep. 417 (1856) (deliberate choice of victim to forego place of safety exonerates defendant of liability for victim's subsequent death from exposure).

the exclusive province of the jury, the appellate courts may not substitute their own findings for the jury's possible failure to consider the issue. See *United States* v. *Howard*, 506 F.2d 1131, 1134 (2d Cir. 1974). There was evidence that Kibbe and Krall abandoned Stafford near an open and lit service station and that although Stafford was intoxicated he was not helpless. It also appeared that Blake was less than diligent in the operation of his motor vehicle. If the jury had been cognizant of the proper legal standards, this evidence, if believed, could have injected an element of reasonable doubt into the jury's deliberations as to whether defendants foresaw or could have foreseen that about one-half hour after they abandoned Stafford he would be struck in the middle of a highway lane by the driver of a speeding truck who failed to react in such a way to avoid a collision.

We are convinced that the trial judge's incomplete instructions took a necessary determination of causation of death from the jury and thereby deprived appellant of his right to due process. See *United States ex rel. Smith* v. *Reincke*, 239 F. Supp. 887 (D. Conn.), aff'd, 354 F.2d 418 (2d Cir. 1965); cert. denied, 384 U.S. 993 (1966). See also *United States* v. *Singleton*, Docket No. 75-1114 (2d Cir. Feb. 13, 1976); *United States* v. *Hines*, 256 F.2d 561, 564 (2d Cir. 1958). Since the error in the instruction reaches constitutional dimensions, it may be corrected on habeas corpus. ~~*Kenion* v.~~ *Gill*, 155 F.2d 176 (D.C. Cir. 1946). We are therefore compelled to grant the writ with respect to the murder conviction.

Appendix A.

MANSFIELD, *Circuit Judge* (Dissenting):

With due respect I must dissent because in my view the deficiency in the trial judge's instruction regarding causation did not reach constitutional dimensions entitling the petitioner to federal habeas relief. See *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973); *Schaefer* v. *Leone*, 443 F.2d 182 (2d Cir. 1971).

There was ample evidence to support a finding by the jury beyond a reasonable doubt that the defendants were guilty of murder in violation of N.Y. Penal Law §125.25(2). The proof was clear that the defendants evidenced a depraved indifference to human life and that they recklessly engaged in conduct which not only created a grave risk of death to the victim, George Stafford, but was a direct cause of his death. See *People* v. *Kibbe*, 35 N.Y.2d 407, 362 N.Y.S.2d 848 (1974). On a dark, cold night (temperature 4°) the defendants placed their intoxicated victim into their automobile, drove away, robbed him and left him on a highway, with his boots off, his pants down or off, and stripped of eyeglasses he needed to be able to focus. They deserted him at a point about a quarter of a mile from the nearest shelter, a gasoline station located on the other side of the highway. It was readily foreseeable that in his condition Stafford might be struck and killed by a motorist, which is what happened.

The jury was well aware that it had to find beyond a reasonable doubt that the defendants' conduct was a direct cause of Stafford's death and that death was not attributable solely to the motorist. In his summation the prosecutor argued repeatedly that although the immediate or direct cause of the victim's death was the conduct of the motorist who struck him, the reckless conduct of the defendants was a substantial producing cause of his death because they were "bound to anticipate that he would be

Appendix A.

struck by a car, struck and killed by a car" and "these two defendants were aware of and consciously disregarded a substantial and unjustifiable risk that death would result." [1] In his summation one defense counsel conversely argued that the cause of death was not his client's conduct but that of the motorist.

Against this background the trial judge instructed the jury that a person is guilty of murder in violation of §125.25 when "under circumstances evincing a depraved indifference to human life he recklessly engages in conduct which creates a grave risk of death to another person. *And thereby causes the death of another person.*" (Emphasis added). Furthermore he instructed the jury that it could not consider the alternate crimes of man-

1 "There is one other aspect that I'd like to talk about on this first count, and also actually in regard to the second count. As I mentioned not only does the first count contain reference to and require proof of a depraved indifference to a human life, it proves that the defendant recklessly engaged in conduct which created a risk of death in that they caused the death of George Stafford. Now, I very well know, members of the jury, you know, that quite obviously the acts of both of these defendants were not the only the direct or the most preceding cause of his death. If I walked with one of you downtown, you know, and we went across one of the bridges and you couldn't swim and I pushed you over and you drowned because you can't swim, I suppose you can say, well, you drowned because you couldn't swim. But of course, the fact is that I pushed you over. The same thing here. Sure, the death, the most immediate, the most preceding, the most direct cause of Mr. Stafford's death was the motor vehicle, the truck driven by Mr. Blake that hit him right square, the middle of the grill. I think he said, that Mr. Stafford was seated or I forget how he described him, he's not standing up, or at least he's on his knees or he is sitting down with his hands up in the middle of the northbound lane. Sure, that's the most direct cause of death. But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there. His glasses were taken and his identification was taken and his pants were around his ankles." (Tr. 1155-57).

slaughter in the first degree or manslaughter in the second degree "unless you feel that these defendants or either of them, was guilty of causing the death of George Stafford recklessly."

No exception was taken by defense counsel to the charge as thus given by the court, and no question was raised as to the sufficiency of the charge on defendants' appeal to the Appellate Division, see *People* v. *Kibbe*, 41 App. Div. 2d 228, 342 N.Y.S.2d 386 (4th Dept. 1973). The adequacy of the instruction was first raised by the dissenting opinion of one justice of the Fourth Department.

Although it might have been helpful to the jury to have a more definitive instruction on the element of causation, including an explanation of the concepts of proximate, superseding, and intervening causation, I cannot agree with the majority that such a detailed instruction was constitutionally required or that the failure to give it permitted "the jury to conclude that the issue was not before them." We are not here dealing with such fundamental unfairness as failure to advise the jury that the defendant was presumed to be innocent or the substitution by the court in its instruction of a preponderance-of-the-evidence for a reasonable doubt standard, see *In re Winship*, 397 U.S. 358 (1970). Here the jury plainly was made aware by the summations of the necessity of finding that the defendants' conduct was the cause of the victim's death even though it may not have been the only cause. In these circumstances the court's instruction was sufficient to enable the jury intelligently to go about its business. It was readily apparent to the jury, without detailed instructions on the subject, that it could not find the defendants guilty if death was attributable entirely to some intervening force which superseded the defendants' recklessly indifferent conduct. As the New York Court of Appeals unanimously concluded in affirming the conviction, the evidence was

overwhelming that the defendants' conduct in depositing their intoxicated robbery victim on the highway in darkness and 4° weather, partially clothed and without eyeglasses, was the direct cause of his death.

> "The defendants do not dispute the fact that their conduct evinced a depraved indifference to human life which created a grave risk of death, but rather they argue that it was just as likely that Stafford would be miraculously rescued by a good samaritan. We cannot accept such an argument. There can be little doubt but that Stafford would have frozen to death in his state of undress had he remainded on the shoulder of the road. The only alternative left to him was the highway, which in his condition, for one reason or another, clearly foreboded the probability of his resulting death." 35 N.Y.2d at 407, 362 N.Y.S.2d at 852.

I cannot subscribe to the idea that on such a record they were denied any constitutional right by the brevity of the court's charge on causation. Their trial was a fair one.

APPENDIX B

Amendment to the Court of Appeals Opinion, May 4, 1976.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 4th day of May, one thousand nine hundred and seventy-six.

BARRY WARREN KIBBE,

Petitioner-Appellant,

v.

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated April 27, 1976 to amend the judgment of this court to include a provision that the writ is granted unless petitioner is re-tried within sixty (60) days from the date the judgment is filed be and it hereby is granted.

It is further ordered that the opinion of this court is amended to replace the last sentence of the majority

opinion with the following:

> "The writ is granted as to any detention arising from the murder conviction, unless retrial of the petitioner on said murder charge is commenced within 60 days from the date of the filing of this order."

/s/
J. Edward Lumbard

/s/
J. Joseph Smith

/s/
Walter R. Mansfield
Circuit Judges

APPENDIX C

Opinion of the United States District Court, June 27, 1975.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

75-CV-

UNITED STATES OF AMERICA, ex rel. BARRY WARREN KIBBE and ROY A. KRALL,

Relators,

against

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Petitioner Kibbe in this habeas corpus proceeding with a title joining Krall who was convicted and sentenced with him is an inmate of Auburn Correctional Facility. After a jury trial in Monroe County Court, petitioner was convicted of Murder in violation of N.Y. Penal Law, § 125.25, subd. 2; Robbery in the second degree; and Grand Larceny in the third degree. Under judgments of conviction entered November 30, 1971, petitioner was sentenced to concurrent terms of 15 years to life on the Murder conviction; 5 to 15 years on the Robbery conviction; and an indeterminate term up to 4 years on the Grand Larceny one. The conviction was affirmed on appeal, opinions being written both by the Appellate Division (41 A.D.2d 228, 4th

Dept. 1973), and the Court of Appeals (35 N.Y. 2d 407, 1974). Petitioner's brief in support of this petition is practically verbatim from his brief filed in the Court of Appeals, as indicated by the points of counsel found in the official New York Court of Appeals report at pp. 407-408, and compared with the brief filed in this federal court, beginning on p. 10.

The facts are set forth in detail by Judge Gabrielli in his opinion for the Court of Appeals, but shall be summarized again. Petitioner and a codefendant agreed to take the victim from a bar in Rochester to Canandaigua on a cold night in December 19[illegible]. The victim was very intoxicated. Petitioner and his codefendant partially undressed the victim, George Stafford, stole his money and then left him on the side of a lonely country road. A driver of a truck later that night saw the victim sitting in the northbound lane with his hands up in the air and could not stop the truck in time and ran Stafford down causing his death. Judge Gabrielli (p. 411) stated that the basic challenge in the New York Court of Appeals was to the murder conviction questioning whether the acts of defendants "caused the death of another" as required by statute.

Petitioner's first point is that the trial court's charge to the jury was defective, in that it failed to include an instruction on the element of causation and on petitioner's mental state. Both State appellate opinions reviewing the conviction discussed this point carefully. Both noted there were no exceptions or requests to charge on the cause of death issue by defense counsel. The correctness of a charge fails to raise a question of federal constitutional dimensions. United States ex rel. Mintzer v. Dros, 403 F.2d 42 (2d Cir. 1967). Where there is no showing that alleged errors in the charge were such as to deprive defendant of a federal constitutional right, the charge is not reviewable in a federal habeas corpus proceeding. Cupp v. Naughten, 414 U.S. 141 (1973).

Appendix C.

The second point urged by petitioner is that the evidence at the trial was insufficient to sustain the conviction for murder. Federal habeas corpus it is settled may not be used to test the sufficiency of the evidence. United States ex rel. Morton v. Mancusi, 393 F.2d 482 (2d Cir. 1968); cert. denied, 393 U.S. 927 (1968); United States ex rel. Sadowy v. Fay, 284 F.2d 426 (2d Cir. 1960).

The third point is that the court erred in denying petitioner's motions to suppress evidence (a $100 bill) and items seized from petitioner's vehicle. Errors in the admission or exclusion of evidence at a state trial form no basis for habeas corpus relief unless there is evident deprivation of a fundamentally fair trial and that has not been shown here. United States ex rel. Green v. McMann, 268 F. Supp. 529 (S.D.N.Y. 1967); United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y. 1969). There is nothing offered of substance to indicate that there was not sufficient support for the State Court rulings that the $100 bill and items seized from the vehicle were other than voluntarily given or taken with consent and not illegally.

The trial court's refusal to grant petitioner a trial separate from his codefendant is within the court's discretion. There was no violation of the Bruton rule that could be considered prejudicial because petitioner's codefendant Krall testified at the joint trial. Bruton v. United States, 391 U.S. 123 (1968). It is not claimed the statements or confessions were not substantially the same or inconsistent. See United States ex rel. Duff v. Zelker, 452 F.2d 1009 (2d Cir. 1971), cert. denied, 406 U.S. 932 (1972); United States ex rel. Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973).

The final point is entitled: "The Court erred in not suppressing all or some of the petitioner's statements either as a product of a primary illegality or as not being made after proper advice or after a valid waiver." Point V, pp. 29-30, of petitioner's application casts doubt upon any contention that the principles of Miranda v. Arizona, 384 U.S.

Appendix C.

436 (1966), were violated. There was a waiver form involved and also oral warnings. Words which convey the substance of the Miranda warning are sufficient. United States v. Vanterpool, 394 F.2d 697, 698-99 (2d Cir. 1968). United States v. Lamia, 429 F.2d 373, 376-77 (2d Cir. 1970), cert. denied, 400 U.S. 907. Further, Judge Gabrielli in his opinion and Appellate Division Justice Henry stated flatly the statements of the petitioner and his codefendant were voluntary.

From my review of the state opinions and records furnished me, plaintiff fails in this respect to establish by convincing evidence that the factual determination of voluntariness made in the State courts is erroneous. LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Allen v. LaVallee, 411 F.2d 241, 244 (2d Cir. 1969). There is no showing of circumstances of the type that do give concern, such as prolonged questioning, physical abuse, lack of food or water, that might warrant finding the admissions and confessions were involuntary. There was adequate hearing under People v. Huntley, 15 N.Y. 2d 72 (1965), and there is no evident reason why the presumption of correctness should not apply. 28 U.S.C. 2254(d); United States ex rel. Rivera v. Follette, 395 F.2d 450 (2d Cir. 1968); United States ex rel. Coleman v. Mancusi, 423 F.2d 985 (2d Cir. 1970).

In my judgment the State trial and appellate determinations were fairly and carefully made and I am content to accept them. The petition shall be filed without payment of fee and is denied and dismissed for the foregoing reasons.

It is so Ordered.

Dated: June 27, 1975
Albany, New York.

/s/ James T. Foley
United States District Judge

Supreme Court, U. S.
FILED
JUL 6 1976
MICHAEL RODAK, JR., CLERK

75-1906

In The

Supreme Court of the United States

October Term, 1975

No.

ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Petitioner,

vs.

BARRY WARREN KIBBE

Petition of the Monroe County, New York, District Attorney as Amicus Curiae for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

LAWRENCE T. KURLANDER
District Attorney of Monroe County
201 Hall of Justice
Rochester, New York 14614

Amicus Curiae

Daily Record Corporation
Rochester, New York

(2051)

Spaulding Law Printing
Syracuse, New York

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---

To the Honorable Justices of the Supreme Court of the United States:

The *amicus curiae* asks this Court to grant a writ of certiorari and review the judgment of the United States Court of Appeals for the second circuit in *Barry Warren Kibbe vs. Robert J. Henderson*, which was decided and judgment entered on April 8, 1976.

Opinions and Orders Below

The judgment of the Court of Appeals granting the writ of *habeas corpus*, the order denying rehearing, the order denying rehearing *en banc* and the decision and order of the District Court for the Northern District of New York are not reported, and are appended to the petition of the Attorney General of New York, counsel for petitioner. The decision of the New York Court of Appeals is reported in 35 N. Y. 2d 407, and the decision of the intermediate state appellate court is reported in 41 A.D. 2d 228, each sub nom *People vs. Kibbe.*

Jurisdiction

This Court has jurisdiction pursuant to Title 28 U.S.C. §1254 (1). The Court of Appeals judgment reversing the District Court for the Western District of New York was entered April 8, 1976. The petition for rehearing and rehearing en banc were each denied by the Court of Appeals on May 21, 1976.

Questions Presented

1: May the sufficiency of a charge to the jury in a state criminal prosecution be reviewed in isolation by a federal court to determine if the defendant was accorded due process?

2: May a defendant who does not object to the charge to the jury and who does not raise the issue on appeal nevertheless attack its sufficiency in federal *habeas corpus?*

3: Where a state jury in a criminal case is presented with each element of the offenses alleged, is a federal due process issue raised on grounds the charge was not detailed enough?

Statement of The Case

The facts are set out in detail in the petition of the Attorney General of New York. We include this, somewhat shorter version, for continuity and clarity.

Barry Kibbe and his co-defendant picked up their victim, Stafford, in a bar and offered to drive him home after they had seen him flash a roll of over two hundred dollars. He was concededly drunk when the trip to his house commenced. They soon turned down a remote county road, robbed him, and left him on the side of the road.

It was a cold winter night, temperature about 4 degrees farenheit. It had snowed, but the roadway had been plowed, and the excess snow formed snowbanks along the sides of the road. A few minutes later, a motorist, returning home, saw Stafford sitting in the roadway. The motorist couldn't react, and struck him. Stafford died that night in the hospital.

It later developed that Stafford's eyeglasses, his coat and his shoes had been removed by defendants and not returned when he was ejected from the car.

Defendants were indicted under New York Penal Law §125.25 (as effective in 1971), which makes it murder when:

> "***2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of a death to another person and thereby causes the death of another person; ***"

There was no objection to the judge's charge at the conclusion of the case, and the issue of causation was not raised on direct appeal to the state's intermediate appellate court (appellate division of supreme court). The conviction was affirmed, but one judge dissented on grounds the charge did not define or explain causation. The Court of Appeals affirmed unanimously, but said the charge could have been more detailed.

Kibbe's subsequent habeas corpus petition was denied by the district court for the western district of New York. On appeal, the second circuit court of appeals reversed, and granted the writ (one judge dissenting).

Reasons For Granting The Writ

In reversing the district court and granting the writ, the court of appeals majority necessarily found that the charge was deficient, and that the deficiency rose to Constitutional dimensions.

If review is granted, we will show that this decision conflicts with earlier decisions of this Court, as well as decisions of other court of appeals, including the second circuit.

Briefly, the second circuit majority based its decision on two theories: that the charge to the jury was sufficiently deficient so as to prevent the jury from declining all the necessary issues, and that defendant by failing to object to the charge had not deliberately by-passed the state's procedures, thereby preserving the issue for correction by *habeas corpus*.

We respectfully disagree with each of these conclusions, because they are a sharp departure from prior decisional law, and in addition, may add a serious burden to local prosecutors.

A. The By-Pass Issue

In *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, this Court pointed out that federal habeas corpus jurisdiction is not affected by procedural defaults occurring during the state court proceedings (discussion at 372 U.S. 438, 83 S. Ct. 848). The Court then said (372 U.S. at 439, 83 S. Ct. at 849):

> "*** If a habeas applicant, after consulting with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state court refused to entertain his federal claim on the merits ***."

Following this rationale, the court of appeals decided that defendant's failure to object to the charge was not a deliberate by-pass because the entire thrust of the defense was that the defendants had not caused the victim's death, but that the death resulted from the intervening acts of the motorist that actually struck the victim Stafford (slip opinion at 3087).

The thrust of *Fay* was that the federal courts should not be bound by state procedural rules which deprived a defendant of the right to test a Constitutional claim, if those rules were merely technical (see *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564).

The state requirement that a defendant make a timely objection of the charge so that corrective action, if necessary, can be taken is not merely technical. The state has a great interest in orderly court proceedings. Furthermore, the court of appeal's opinion notwithstanding, the state courts did consider the sufficiency of the charge. *People v. Kibbe*, 41 A.D. 2d at 230, and the dissent in that court at page 230.

In addition, the court of appeal's interpretation of the acts of the defense (slip opinion at 3087) do not square with the fact that the defense never raised the sufficiency issue in their appeal to the intermediate appellate court.

On review, we will show the Court that the by-pass theory is not applicable to the facts of this case. We will also show that this ruling will add an additional burden to every local prosecutor: we will now be required to examine every judge's charge for sufficiency without relying on defense counsel to make any objections or requests, since no objections from them will be required if their theory of the defense is clear from the

case. This will make our advocate's role very difficult. It could also encourage lackadaisical defense work.

B. The Sufficiency Of The Charge

The sufficiency of the jury charge was in issue in *Kenion v. Gill*, 155 F. 2d 176 (D.C. Cir., 1946), where the court said (at page 178):

> "*** Mere errors in the charge however, do not constitute sufficient basis for grant of habeas corpus. The inadequacy prerequsite to that writ must consist of the omission of essentials to such an extent that the accused is denied a fair trial in the Constitutional sense. ***"

Recently, in *Cupp v. Naughton*, 414 U.S. 141, 94 S. Ct. 396 (1973) this Court noted that a jury instruction cannot be viewed in isolation, but must be examined in light of the entire charge as well as the rest of the case (discussion 414 U.S. at 146, 147, 94 S. Ct. at 400).

In the present case, the opinion is apparently in conflict with the holdings above. The accused was not denied a fair trial in the state court per the *Kenion* holding, since it is clear from the entire charge, as well as the opening remarks and summations of the parties what the issues were. Furthermore, in order to find a due process violation in the charge, the court below had to view the omission in isolation, in conflict with the holding in *Cupp*.

The holding below is also in conflict with an earlier holding of that court.

In *U.S. ex rel. Smith v. Montayne*, 505 F. 2d 1355 (2nd Cir., 1974) one of the issues was the jury charge on intoxication and its effect on the question of intent.

In disposing of that issue, the court said at page 1359:

> " *** Whether or not the jury charge under consideration here is reversible as a matter of state law, the

> alleged errors are not of constitutional dimension. Defendant received a full and fair hearing and the trial judge's charge did not deprive defendant of his fundamental right to due process of law. It should be noted in addition that defendant's counsel did not request a specific charge, nor did he make objection to the judge's charge on any of the points currently before this court. *** "

This Court should accept this case for review to settle the question of what the local prosecutor's responsibilities are respecting the sufficiency of the jury instruction.

Respectfully submitted,

Lawrence T. Kurlander
District Attorney of Monroe County
amicus curiae
201 Hall of Justice
Rochester, New York 14614

Melvin Bressler, Esq.
of counsel

Supreme Court, U. S.
FILED
NOV 29 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

BARRY WARREN KIBBE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIERARI FILED JULY 1, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

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Docket Entries—District Court.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

75—CV—314

Date	*Proceedings*
June 30, 1975	Filed Petition for Writ of Habeas Corpus, together with related papers
June 30, 1975	Filed State Court Brief
June 30, 1975	Filed Memorandum-Decision and Order of Judge Foley (6/27/75) denying and dismissing the petition for writ of habeas corpus and directing that the petition be filed without payment of fee.
June 30, 1975	Filed Judgment
July 14, 1975	Filed Notice of Appeal
July 14, 1975	Filed Memorandum-Decision and Order of Judge Foley (7/11/75) denying application for certificate of probable cause. Motion for leave to proceed in forma pauperis is granted to the limited extent of the notice of appeal
August 18, 1975	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
October 16, 1975	Filed receipt for papers sent to C.C.A. 2nd Circuit

Petition.

PETITION FOR WRIT OF HABEAS CORPUS

Sir:

Barry Warren Kibbe, relator-petitioner aforesaid addressed this Honorable Court for issuance of a Writ of Habeas Corpus ad subjiciemdum, pursuant to Title 28 U.S.C. 2241 et. seq. (United States ex rel. Lynch v. Fay, D.C.N.Y., 1960 184 Fed. Supp. 277 et. seq.) on the grounds that he is in custody contrary to the Constitution, specifically in violation of the Fourteenth Amendment, whereby he is held under color of judgment of conviction from a New York State Court, to wit: Monroe County Court and which judgment is unconstitutional, more specifically and in detail established in the annexed affidavit as a Memorandum of Law.

AFFIDAVIT AS MEMORANDUM OF LAW

Barry Warren Kibbe, relator-petitioner in the above entitled action, being duly sworn, deposes and says:

(1) That, he is the relator in the foregoing petition for Writ of Habeas Corpus;

(2) That, jurisdiction is invoked under Title 28 U.S.C. Section(s) 2241 et seq. in that;

(a) He is in custody in violation of the Constitution being confined and held by respondent under color of a judgment of conviction and sentence entered in a Monroe County Court, Rochester, New York, on November 30, 1971, following a trial by jury held from October 27 through November 5, 1971, on charges alleging the crimes of murder in violation of sections 20.00 and 125.25; robbery in the first degree in violation of sections 20.00 and 160.15; robbery in the second degree in violation of sections 20.00 and 160.10(1); and grand larceny in the third degree in violation of sections 20.00 and 155.30(5). Sentence having

been imposed thereon of an indeterminate sentence of imprisonment with a minimum of 15 years and a maximum term of life on the conviction of murder; an indeterminate sentence of imprisonment with a minimum of 5 years and a maximum of 15 years on the conviction of robbery in the second degree; and an indeterminate sentence of imprisonment with a maximum of 4 years on the conviction of grand larceny third degree. All terms were ordered to run concurrently, the said proceeding and judgment being had on a denial of due process of law under the Fourteenth Amendment; and,

(b) Timely notice of appeal was filed, motion to appeal in forma pauperis was granted by the Appellate Division, Fourth Judicial Department, and in a majority decision dated April 5, 1973, at 41 A.D. 2d 228 the Appellate Division affirmed the convictions of both relator's. Application for a Certificate Granting Leave to Appeal to the New York State Court of Appeals, was granted on May 11, 1973, by the Hon. Matthew J. Jasen, Associate Judge of the Court of Appeals. On November 27, 1974, the Court of Appeals affirmed the decision of the Appellate Division.

(3) Relator has exhausted all State remedies and, no other application for relief on the grounds herein has been sought for in this, or any other Federal Court, prior to this instant petition; and,

(4) That the violation of relator's constitutional rights persist in that, although relator's constitutional rights have been violated, relator is still held and confined by respondent; and,

(5) That the Writ of Habeas Corpus should issue, a full evidentiary hearing should be held to inquire into the allegations herein raised (Townsend v. Sain, 372 U.S. 293; Fay v. Noia, 372 U.S. 391) the Writ should be sustained

and relator ordered released from custody on the law and the facts instant.

STATEMENT OF FACTS

At approximately 10:00 p.m. on December 30, 1970 George Stafford was observed sitting with his arms raised in the middle of the north-bound lane of traffic on East River Road by Michael Blake, a college student (R. 618), who was driving his 1¾ ton truck approximately 50 mph, which was 10 mph in excess of the authorized speed limit on that portion of the highway (R. 626, 630).

When Blake initially observed Stafford, he was approximately 100-200 feet in front of him (R. 622), and at that point, Blake went into shock, and neither applied his brakes nor attempted to swerve the truck around the pedestrian (R. 622). The vehicle struck Stafford and dragged him approximately 400 feet (R. 623) and as a result of the impact, Stafford was severely injured, and the grill on Blake's truck was damaged beyond repair (R. 629).

An ambulance was called to the scene; and as it was transporting Stafford to the hospital, it was involved in an accident (R. 634), which required Stafford to be transferred to a second ambulance which then transported the decedent to the hospital where he was pronounced dead on arrival.

Neither defendant was present at the time Stafford was struck by the vehicle on East River Road, nor was there any evidence introduced at the trial which inferred that either defendant placed the decedent in the middle of East River Road, prior to the accident.

The defendants initial contact with the decedent, George Stafford, occurred earlier in the day at approximately 6 p.m., at Nick and Corkey's Tavern on Jay Street in the City of Rochester (R. 806). Kibbe had stopped in the Tavern after work and while there, he and his friends were

approached by the decedent who was seeking a ride to Canandaigua, New York (R. 805).

A friend of Kibbe's, Don Tiffany had agreed to give Stafford a ride to Canandaigua; but his car wouldn't start (R. 1014) and therefore Kibbe and Krall volunteered to give Stafford the ride (R. 808). The three of them left the tavern somewhere between 8:30 and 9:30 p.m. (R. 722) and using Kibbe's car, they first drove to a couple of bars on Plymouth Avenue in the City of Rochester (R. 848). In the first of these bars, the bartender wouldn't serve Stafford so the three of them walked across the street to another bar where they had no difficulty in being served (R. 848, 849).

(R. refers to page of trial minutes.)

After leaving this second bar, they proceeded to the Thruway for the purpose of driving Stafford to Canandaigua, but when they reached the Thruway, Stafford changed his mind and no longer wanted to go to Canandaigua (R. 1016). In view of this change, the defendants started driving back to the city.

To get back to the city, they traveled on Bailey Road to the intersection of Bailey Road and East River Road where they turned right and proceeded in a northerly direction (R. 1017). At this point, Stafford who was seated in the rear seat, was dozing off and Kibbe who was in the front passenger seat turned around and slapped Stafford in an attempt to wake him up and asked him if he was going to pay them for the ride as he had previously promised (R. 1017). When asked by Kibbe if he had any more money, Stafford partially disrobed to show him that he did not (R. 851-852) and Kibbe, to make sure, searched Stafford's pants and boots (R. 833).

When they came to a store at the intersection of East River Road and River Meadow Drive, Stafford stated that he wanted to get out of the vehicle and as a result, Krall

stopped the car about 75 feet from a store which was open and across the street from a gas station which was also open and attended by a serviceman (R. 182, 1060, 1062, 656).

Stafford exited the vehicle and according to the defendant Krall, he had clothes on with the exception of his jacket and his boots (R. 852). After Stafford left the vehicle, he fell in the snow and Kibbe got out of the car and helped him up (R. 1065). Kibbe also advised Stafford to go to the gas station nearby so he wouldn't freeze to death in the cold night (R. 838-39).

The defendants then proceeded to Cliff's Bar at which time, Kibbe gave Krall a one hundred dollar bill (R. 1021) and then Krall drove Kibbe home (R. 828) and Krall, using Kibbe's car, went back to Nick and Corkey's Tavern in an attempt to change the one hundred dollar bill (R. 829).

Investigation at the Scene of the Accident

Shortly after the accident, Deputy Sheriff Terrance Cooper arrived at the scene and made measurements with respect to the exact location of the body of George Stafford (R. 29). According to these measurements, the body was lying 50 feet 11 inches from the Rochester Telephone Pole No. 215 (R. 646) and according to the deputy, the point of impact was approximately a quarter mile south of the gas station which is located near the intersection of River Meadow and East River Road (R. 625). The deputy testified that the gas station was lit up (R. 656) but that he made no attempt to determine if the decedent had walked any distance to get to the point of the accident (R. 37).

The following morning, at approximately 8:40 a.m., Chief Deputy Blodgett arrived at the scene of the accident (R. 676). Although the Deputy could find no footprints (R. 678), there had been a snowfall the evening before as well as blowing snow (R. 31) and the road pavement was at all times clear of snow and ice (R. 621).

The deputy found a pair of boots near the scene of the accident as well as some watchparts and a sock (R. 678-679). According to Deputy Blodgett, the point of impact was approximately a quarter mile north of Bailey Road and the same distance south from the gas station where the defendant Krall had testified was the point where they had left the decedent.

Questioning at the Sheriff's Office

On December 31, 1970, Kibbe was picked up at Nick & Corky's Tavern and taken to the Monroe County Sheriff's Office by Detective Burton Verhay and brought into the front parlor at 4:00 p.m. (R. 76). Between 4:00 and 4:18 he was left sitting on a couch and nothing transpired until 4:18 when Detective Nicholas DeRosa read him his rights from a waiver card (R. 75). He was asked for his identification and then was asked to empty his pockets, which he did (R. 79). Two detectives questioned Kibbe and during the questioning Kibbe was asked if he had a $100 bill in his possession (R. 80). Kibbe produced the bill and handed it over to the detectives (R. 80). At this point he was not under arrest, nor had any charges been placed against him (R. 86).

A stenographer was called and Kibbe was reinterviewed and a statement taken (R. 81). Co-defendant Krall was questioned separately (R. 100), and then Kibbe and Krall were made to confront each other (R. 104) under questioning from three detectives (R. 104).

By 7:45 p.m. Kibbe had still not been charged with any crime (R. 103). Then at 8:30 p.m., Assistant District Attorney Cornelius arrived to further question Kibbe (R. 770). This time no one advised Kibbe of his rights and a third statement was recorded. Shortly before eleven o'clock Kibbe was finally arraigned after being questioned

and held for seven hours (R. 106). At no time during these seven hours prior to the arraignment was Kibbe arrested or advised that he was going to be held for the crimes of murder and robbery (R. 108).

Search of Kibbe's Car

The co-defendant Krall had driven Kibbe's car home on the evening of December 30, 1970. During the early evening of December 31, 1970, Detectives Emerson and Cerreto went to Krall's home to locate the car (R. 887). The car was parked, according to the detectives, in a position that blocked the entrance to the apartment house (R. 890). Neither Detective Emerson nor Detective DeRosa had a search warrant or Kibbe's consent to search the vehicle (R. 917).

As Detective Emerson pushed the car away from the entrance to the apartment house, he looked down on the floor board of the car and in the light from a street lamp he noticed a white envelope (R. 909). The envelope was wet, its contents were coming out of it; and a pink registration slip was on top (R. 910). The only light was that of a street lamp and Detective Emerson testified that he himself was surprised that he was able to read the name of George Stafford on the registration slip (R. 966). The papers and other items in the car were then photographed and all items, except for a pair of eye-glasses, were removed from the vehicle (R. 892).

Later, when Kibbe's car had been towed to the Sheriff's garage, Detective Emerson, in the belief that he had forgotten a folder in the car (R. 898), returned to the car together with Detective Verhay. They took photographs of the eye-glasses and removed them from the vehicle (R. 898). Here, as during the prior search, no search warrants had been obtained nor had either of the defendants given their consent to a search (R. 927).

The above items seized from Kibbe's vehicle were introduced in evidence over defendant's objections as Exhibits 14, 15, 16 and 17 (R. 949, 974).

Questions Presented

I. Whether the defective charge to the jury requires a reversal of the convictions.

II. Whether the proof adduced at the trial was sufficient to sustain a conviction for murder.

• • •

ARGUMENT

Point I

The Trial Court's Charge to the Jury was Defective and Constituted Reversible Error

A. The Charge Failed to Include an Instruction on the Element of Causation.

As appears from a review of the facts, a key issue involved in the trial below was whether the defendant's conduct *caused* the death of George Stafford, which is an essential element of the crime of murder.

Although the defendant's placed the decedent in the vicinity of the accident scene, the conduct of Michael Blake as well as that of the decedent, clearly contributed to the happening of the accident.

Despite the presence of this crucial issue, the trial judge's charge failed to include any reference to the element of causation other than a reading of the statutory language contained in section 125.25(2) of the penal law. It was incumbent upon the judge to define the element of causation and set forth an instruction on proximate cause as well as intervening cause. In addition it was essential for him to

charge that a verdict of guilty on the murder count required the jury to find that the evidence proved beyond a reasonable doubt that the defendant's counduct was the direct and proximate cause of the decedents death and that they should consider the conduct of the decedent as well as that of Michael Blake in resolving this issue.

It is established law in New York that each element of a crime for which a defendant is indicted should be stated distinctly and explained to the jury; see *People* v. *Best,* 253 App. Div. 491 (3rd Dep't, 1938), and *People* v. *Lupo,* 305 N.Y. 448 (1953).

In *People* v. *Brengard,* 265 N.Y. 100, 108 (1934) this court stated:

> The question whether the act constitutes murder in necessarily one of fact. An obscure or merely probable connection between an assault and death will, as in every case of alleged crime, require acquittal of the charge of any degree of homicide. The proximate relationship must, of course, be clearly proved beyond a reasonable doubt. *A duty rests upon the trial judge so to instruct the jury and, in the absence of such instruction or in the event of failure of the necessary proof, a similar duty would rest upon a court of review to reverse a judgment of conviction.* (Emphasis added). (*People* v. *Brengard,* supra at p. 108).

The highest courts in other states have also firmly established the principle that failure to charge the jury adequately on the causal connection between the defendant's acts and the death of the victim is reversible error; *People* v. *Kerrick,* 86 Cal. App. 592 (1927); *People* v. *Bernhardt,* 35 Cal. Rptrs. 41 (1964); *State* v. *Ramey,* 273 N.C. 325, 160 S.E. 2d 56 (1968); *State* v. *Redman,* 217 N.C. 483, 8 S.E. 2d 623 (1940); *Commonwealth* v. *Root,* 403 Pa. 571, 170 A. 2d 310 (1961); *People* v. *Scott,* 29 Mich. App. 549, 185 N.W.

2d 576 (1971); *Stublingbear* v. *State, Okl. Cr.,* 364 P. 2d 1115 (1961).

It appears that of the above cases the leading opinion on proximate cause in a criminal trial is *Commonwealth* v. *Root,* supra. In this case, the defendant had challenged the decedent to a car race on a public highway and at one point in the race, the decedent, who was travelling at a high rate of speed, attempted to pass the defendant, and as he did, he swerved into an oncoming truck and was killed. The court, in a lengthy discussion on the nature of proximate cause in criminal matters held that:

> Even if the tort liability concept of proximate cause were to be deemed applicable, the defendant's conviction of involuntary manslaughter in the instant case could not be sustained under the evidence. The operative effect of a supervening cause would have to be taken into consideration. . . . But the trial judge refused the defendant's point or charge to such effect and he erroneously instructed the jury that negligence or want of care (on the part of the deceased) is no defense to the criminal responsibility of defendant. . . . The superior court, in affirming the defendant's conviction in this case, approved the charge abovementioned, despite a number of decisions in involuntary manslaughter cases holding that *the conduct of the deceased victim must be considered in order to determine whether the defendant's reckless acts were the proximate (i.e. sufficiently direct) cause of his death.* (Emphasis added). (*Commonwealth* v. *Root,* supra at p. 313).

This landmark case in Pennsylvania which sets out the law of proximate cause in a criminal matter has been frequently cited in Pennsylvania as well as in other jurisdictions. Although the reasoning of the court is centered primarily upon the concept of proximate cause, the court, in the above cited section, makes clear that it was error for

the trial judge to omit an explicit charge to the jury on the causation issue. The charge in *Root* thus suffered from the same defect as the charge in the instant case, and in both cases the defect constituted reversible error.

B. The Charge Did Not Include a Proper Instruction on The Defendant's Culpable Mental State.

Although the trial court read the statutory language of the murder charge, Section 125.25 of the penal law, and defined the terms "recklessness" (R. 1187), "depraved" and "indifferent" (R. 1188), he failed to set forth the manner in which these terms are interrelated, and did not explain the application of these terms to the facts of the case as required by CPL Section 300.10 Sub. (2).

Upon a reading of the above murder charge, as well as the indictment, it is evident that the proper use of these terms by jurors would require a clarifying instruction by the judge in order to safeguard against the improper application of them to the facts of the case. The confusion which obviously occurred in the instant case was revealed by the jury's request for the indictment (R. 1201): ". . . so, we can go over this and get things clear for us."

In response to this request, the following colloquy occurred outside the presence of the jury (R. 1205):

> Mr. Crimi: I think we should give them a written list of the offenses.
>
> The Court: That isn't what they want certainly the murder charge is unusual and the robbery first charge is unusual and they want to see what words are used.
>
> Mr. Beer: I don't think it would be proper, judge. I think I have read comments and opinions that the indictment not being in evidence can not be used or taken into the jury room.
>
> The Court: It's the only sensible way in which any jury could read the words of an unusual charge contained in the indictment.

Rather than giving a detailed instruction on the application of the "unusual" words used in the indictment, the Judge gave the jury a copy of the indictment without any further elaboration on the meaning of these words which the jury was seeking to clarify in their minds.

Approximately four hours later, the jury again requested an explanation from the Court as to the charges against the defendant's, in order that ". . . they will be clear to us and the laws that pertain to them" (R. 1214).

The judge responded by again reading the statutes involved and did not offer a further explanation on any of the terms or elements of the changes (R. 1214-1218).

It appears to be settled law in New York that the trial judge must do more than merely give a statutory definition and a statement of legal principles as was done in the present case.

Judges are also required to comply with CPL Section 300.10 which provides in pertinent part:

> The Court must also state the material legal principles applicable to the particular case and, so far as practicable explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent then is necessary for such explanation.

In the context of instructions to the jury and a jury's repeated request for clarification, it is important for us to be reminded of this Court's statement of principle in *People* v. *Lupo,* 305 N.Y. 448 (1953) where it stated:

> It may well be, as urged upon us, that every sentence that the Judge uttered, taken by itself, was an accurate statement of law, but justice in its proper

administration demand more. *A study of the instructions in their entirety, particularly when considered in the light of the juror's repeated request for further enlightenment, reveals that the jury was never given any clear notion of the only real question before it—the elements of the several crimes charged and the alternative verdicts possible.* A court's charge is not like a corporate indenture, able to be studied at leisure, valid of all technical recitals are to be found within its four corners. Rather, it is a means to guide laymen, in plain and practical fashion, and the discharge of a solemn responsibility. The charge in the case against Lupo served no such function and, accordingly, he is entitled to a new trial. (Emphasis added). (*People* v. *Lupo,* supra at p. 452)

The Judge's duty to relate the legal principles to the facts of a given case is more prominent when the charges are unusual and the jury is obviously confused by them as was the sitaution in the present case and in *Lupo.* It is not unlikely that the jury in the instant case fashioned their own rules of application regarding the required mental state and rendered a verdict without appreciating the unexplained legal terms contained in the charges.

* * *

D. This Court has Jurisdiction to Review the Defective Charge and Direct a Reversal of the Convictions.

Although neither defendant objected to the erroneous charge of the trial court, the Appellate Division Fourth Department reviewed the sufficiency of the charge in question and the majority were of the opinion that the charge was ". . . sufficient to inform the jury on this subject (causation) and reversal of the judgments is not required in the interest of justice." (41 AD 2d at p. 230).

This Court has the authority pursuant to CPL Section 470.35 to consider those questions of law considered on appeal to the Appellate Division which would include the determination by the Appellate Division that the charge to the jury was sufficient.

As indicated above, the charge to the jury with respect to elements of "causation" and "culpable mental state" was clearly insufficient and confusing as was the purported instruction on the lesser included offense. Taken as a whole, the charge was stifled with statutory language and legalisms and although the trial court recognized the unusual terms and possible confusion a jury would have in applying the principles to the facts of the case, it did nothing to alleviate this confusion other than submitting a copy of the indictment to the jury.

If a proper instruction were given to the jury, it could have reasonably concluded that the defendant's conduct was not the proximate cause of the decedent's death.

Point II

The Evidence Adduced at the Trial Was Insufficient to Sustain the Conviction of Murder.

The petitioner Kibbe was found guilty of murder in violation of Section 125.25(2) of the New York Penal Law, in that he "feloniously and under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to another person, to wit, George Stafford, and thereby *caused* the death of George Stafford."

The proof presented during the trial of this case revealed that the decedent was found sitting in the middle of the highway with his arms raised and while in that position, he was struck by a truck weighing 3500 pounds and traveling at a speed of 50 mph. The driver of the truck, Michael

Blake, admitted he was speeding and that he froze at the wheel when he initially observed the decedent. Blake also testified that he never braked nor swerved the vehicle in an attempt to avoid striking the decedent. There is no evidence to indicate that the defendants placed the decedent in the middle of the highway but rather the evidence tended to show that the decedent was placed by the defendants in the vicinity of the accident and on the shoulder of East River Road. It was also shown that the decedent was intoxicated at that time and his boots and pants had been searched for money before he left the vehicle.

Although the murder statute clearly requires the defendant's conduct to be the cause of death and the proof presented revealed that the cause of death was a combination of the decedent's conduct as well as that of Michael Blake, the trial court denied the petitioner's motions for dismissal and the Appellate Division affirmed the murder conviction.

The Appellate Division, however, erroneously applied a tort standard of proximate cause in affirming the convictions:

> "In our opinion, the evidence sufficiently shows that the death was caused by the acts of defendant's as well as the acts of Blake. 'Where separate acts of negligence combine to produce directly a single injury each tortfeasor is responsible for the entire result, even though his act alone might not have caused it.' *Hill* v. *Edmonds*, 26 A.D. 2d 554 (555)." (*People* v. *Kibbe*, supra at p. 229.)

In effect, the Appellate Division concluded that the causal connection between the conduct of the defendant's and the death of George Stafford can be properly viewed and judged by the traditional tort standard of proximate cause irrespective of the fact that this is a criminal case and not a civil action involving the issue of negligence.

It has been firmly established that the element of causation in a criminal case is more rigidly applied than the standard used in tort cases. This court in *People* v. *Brengard*, 265 N.Y. 100 (1934) recognized the difference in stating at p. 108 "the proximate relationship must, of course, be clearly proved beyond a reasonable doubt".

In *Common Wealth* v. *Root*, 403 Pa 571, 170 A 2d 310 (1961), which was discussed in point 1 above, the court discussed the differences between tort concepts and criminal elements and stated:

> "To summarize, the tort liability concept of proximate cause has no proper place in prosecutions for criminal homicide. A more direct causal connection is required for conviction . . . In the instant case, the defendant's reckless conduct was not a sufficiently direct cause of the competing driver's death to make him criminally liable therefor."

The reason for the Pennsylvania court's holding appears clear from an earlier part of its opinion at p. 311 where it stated:

> To persist in applying the tort liability concept of proximate cause to prosecutions for criminal homicide after the marked expansion of civil liability of defendant's in tort action for negligence, would be to extend possible criminal liability to persons chargeable with unlawful or reckless conduct in circumstances not generally considered to present the likelihood of a resultant death.

Similar reasoning was applied by the Court of Appeals of Michigan in *People* v. *Scott*, 29 Mich. App. 549, 185 N.W. 2d 576 (1971) wherein the court held that there must be a more direct connection between the criminal con-

duct of the defendant and the homicide than is required by the tort concept of proximate cause.

Although the petitioner is aware that the above Michigan and Pennsylvania court's decisions are not binding on this court, it appears that these cases presented as does the instant case, an opportunity for the courts to set a limit on the expansion of negligent conduct in the criminal sphere. It is respectfully submitted that the reasoning contained in these opinions is applicable to the instant case and that the Appellate Division's reliance upon a tort liability concept was misplaced.

The application of the tort concept of proximate cause to the fact of this case, would never the less still require a finding that the petitioner's conduct was not the proximate cause of the decedent's death.

To begin with, the decedent who had apparently consumed a substantial quantity of alcohol had to leave the area where he was dropped off by the defendants and go into the highway and sit in the middle of it and wait until the arrival of an inattentive speeding driver who freezes at the wheel and fails to attempt to turn or brake is car.

The practice commentary by Denzer and McQuillan (McKinney's Consolidated Laws of New York, Book 39, Penal Law p. 235) refers to the offensive conduct envisaged by the revision of the Penal Law and it had to be "extremely dangerous and fatal conduct". The prior section (Penal Law § 1040 (2) which is somewhat similar to the present section was construed in *Darry* v. *People,* 10 N.Y. 120 (1854) and *People* v. *Jernatowski,* 238 N.Y. 188 (1924) and in both cases the acts committed were direct and fatal acts. In *People* v. *Poplis,* 30 N.Y. 2d 85 (1972) where the defendant was convicted for murder following the death of a child who was repeatedly beaten by him, the proof revealed that the death was produced by injuries sustained in the beatings.

Unlike the above cases that have been held to be within this murder statute, neither defendant committed an act directed toward the decedent which caused his death. The death of George Stafford was caused by the combined acts of the decedent and that of Michael Blake the truck driver, and the defendant's conduct was too remote to constitute murder.

• • •

Conclusion

It is Respectfully Submitted that Based Upon the Above, the Judgment of Conviction Against the Petitioner Kibbe be Reversed and that the Charge of Murder be Dismissed and a New Trial Ordered on the Other Counts Contained in the Indictment Against Him.

All of Which is Most Respectfully Prayed for.

Opinion and Order of the District Court, June 27, 1975.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

75-CV-

UNITED STATES OF AMERICA, ex rel. BARRY WARREN KIBBE and ROY A. KRALL,

Relators,

against

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Petitioner Kibbe in this habeas corpus proceeding with a title joining Krall who was convicted and sentenced with him is an inmate of Auburn Correctional Facility. After a jury trial in Monroe County Court, petitioner was convicted of Murder in violation of N.Y. Penal Law, § 125.25, subd. 2; Robbery in the second degree; and Grand Larceny in the third degree. Under judgments of conviction entered November 30, 1971, petitioner was sentenced to concurrent terms of 15 years to life on the Murder conviction; 5 to 15 years on the Robbery conviction; and an indeterminate term up to 4 years on the Grand Larceny one. The conviction was affirmed on appeal, opinions being written both by the Appellate Division (41 A.D.2d 228, 4th Dept. 1973), and the Court of Appeals (35 N.Y. 2d 407,

1974). Petitioner's brief in support of this petition is practically verbatim from his brief filed in the Court of Appeals, as indicated by the points of counsel found in the official New York Court of Appeals report at pp. 407-408, and compared with the brief filed in this federal court, beginning on p. 10.

The facts are set forth in detail by Judge Gabrielli in his opinion for the Court of Appeals, but shall be summarized again. Petitioner and a codefendant agreed to take the victim from a bar in Rochester to Canandaigua on a cold night in December 1970. The victim was very intoxicated. Petitioner and his codefendant partially undressed the victim, George Stafford, stole his money and then left him on the side of a lonely country road. A driver of a truck later that night saw the victim sitting in the northbound lane with his hands up in the air and could not stop the truck in time and ran Stafford down causing his death. Judge Gabrielli (p. 411) stated that the basic challenge in the New York Court of Appeals was to the murder conviction questioning whether the acts of defendants "caused the death of another" as required by statute.

Petitioner's first point is that the trial court's charge to the jury was defective, in that it failed to include an instruction on the element of causation and on petitioner's mental state. Both State appellate opinions reviewing the conviction discussed this point carefully. Both noted there were no exceptions or requests to charge on the cause of death issue by defense counsel. The correctness of a charge fails to raise a question of federal constitutional dimensions. United States ex rel. Mintzer v. Dros, 403 F.2d 42 (2d Cir. 1967). Where there is no showing that alleged errors in the charge were such as to deprive defendant of a federal constitutional right, the charge is not reviewable in a federal habeas corpus proceeding. Cupp v. Naughten, 414 U.S. 141 (1973).

The second point urged by petitioner is that the evidence at the trial was insufficient to sustain the conviction for murder. Federal habeas corpus it is settled may not be used to test the sufficiency of the evidence. United States ex rel. Morton v. Mancusi, 393 F.2d 482 (2d Cir. 1968); cert. denied, 393 U.S. 927 (1968); United States ex rel. Sadowy v. Fay, 284 F.2d 426 (2d Cir. 1960).

The third point is that the court erred in denying petitioner's motions to suppress evidence (a $100 bill) and items seized from petitioner's vehicle. Errors in the admission or exclusion of evidence at a state trial form no basis for habeas corpus relief unless there is evident deprivation of a fundamentally fair trial and that has not been shown here. United States ex rel. Green v. McMann, 268 F. Supp. 529 (S.D.N.Y. 1967); United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y. 1969). There is nothing offered of substance to indicate that there was not sufficient support for the State Court rulings that the $100 bill and items seized from the vehicle were other than voluntarily given or taken with consent and not illegally.

The trial court's refusal to grant petitioner a trial separate from his codefendant is within the court's discretion. There was no violation of the Bruton rule that could be considered prejudicial because petitioner's codefendant Krall testified at the joint trial. Bruton v. United States, 391 U.S. 123 (1968). It is not claimed the statements or confessions were not substantially the same or inconsistent. See United States ex rel. Duff v. Zelker, 452 F.2d 1009 (2d Cir. 1971), cert. denied, 406 U.S. 932 (1972); United States ex rel. Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973).

The final point is entitled: "The Court erred in not suppressing all or some of the petitioner's statements either as a product of a primary illegality or as not being made after proper advice or after a valid waiver." Point V, pp. 29-30, of petitioner's application casts doubt upon any contention that the principles of Miranda v. Arizona, 384 U.S.

436 (1966), were violated. There was a waiver form involved and also oral warnings. Words which convey the substance of the Miranda warning are sufficient. United States v. Vanterpool, 394 F.2d 697, 698-99 (2d Cir. 1968). United States v. Lamia, 429 F.2d 373, 376-77 (2d Cir. 1970), cert. denied, 400 U.S. 907. Further, Judge Gabrielli in his opinion and Appellate Division Justice Henry stated flatly the statements of the petitioner and his codefendant were voluntary.

From my review of the state opinions and records furnished me, plaintiff fails in this respect to establish by convincing evidence that the factual determination of voluntariness made in the State courts is erroneous. LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Allen v. LaVallee, 411 F.2d 241, 244 (2d Cir. 1969). There is no showing of circumstances of the type that do give concern, such as prolonged questioning, physical abuse, lack of food or water, that might warrant finding the admissions and confessions were involuntary. There was adequate hearing under People v. Huntley, 15 N.Y. 2d 72 (1965), and there is no evident reason why the presumption of correctness should not apply. 28 U.S.C. 2254(d); United States ex rel. Rivera v. Follette, 395 F.2d 450 (2d Cir. 1968); United States ex rel. Coleman v. Mancusi, 423 F.2d 985 (2d Cir. 1970).

In my judgment the State trial and appellate determinations were fairly and carefully made and I am content to accept them. The petition shall be filed without payment of fee and is denied and dismissed for the foregoing reasons.

It is so Ordered.

Dated: June 27, 1975
Albany, New York.

/s/ JAMES T. FOLEY
United States District Judge

Excerpt from State Criminal Trial—Pretrial Motion to Dismiss the Indictment.

(3) Mr. Crimi [Kibbe's attorney]: If the Court please, Mr. Cornelius and Mr. Beer. Your Honor, there are three motions that have not yet been disposed of and the first motion that I want to address myself to the Court is the motion that I made in relation to the inspection of the Grand Jury minutes or in alternative to dismiss the indictment on the grounds that there was insufficient legal testimony before the Grand Jury to support and in particular the counts dealing with murder and in violation of the 20 and 125.25 subdivision 2 and robbery in the first-degree. Subsequent to my assignment to this case, I conducted an investigation which disclosed that on or about 10:10 P.M. in the evening of December 30, 1970, one George Stafford was seen by a passing motorist to be sitting with his arm upraised in the easterly lane of traffic and on East River Road, north of Bailey Road and that subsequently while he was so sitting, another automobile coming in the same direction, in the lane in which Mr. Stafford was sitting, struck Mr. Stafford and dragged him some forty-seven feet. Following this, Mr. Stafford was put on an (4) ambulance and enroute to the hospital that ambulance was involved in an accident and following that he was removed into another ambulance and then when he arrived at the hospital, he was pronounced dead. I was also given copies of the statements of both defendants, which I am sure were a part of the grand jury minutes and the review of those statements, even if we assume at this point that they were legal and voluntary, could not support the obligations, in my opinion, of an indictment charging them with murder and robbery in the first degree. The statement of one of the co-defendants, Krall disavows any knowledge of any taking of money and any infliction of serious personal injury upon George Stafford, disavows any positions of said Stafford in any position

of danger other than leaving him on the side of the road and not where he was found, that is, where Mr. Stafford was seen sitting in the road and thereafter struck by a motorist; that the statement of defendant Kibbe likewise disavows any infliction of serious personal injury upon George Stafford or placing him in the path of (5) traffic or other area of danger. That from what I have been able to determine that the grand jury testimony consisted of the confessions of the defendant and the testimony of the two motorists who were involved in one fashion or another in the striking of the decedent while he was sitting in the highway and the medical examiner's testimony. The medical examiner's testimony would appear to show that the decedent was badly injured but obviously the injuries were such that could not be attributed to the defendant's Kibbe's statement that he slapped the defendant slightly and that injuries would be directly connected with the fact that he had been, the decedent, had been struck by the one automobile and possibly had suffered other injuries when struck while he was on the ambulance going to Strong Memorial Hospital; also, the autopsy report shows that the decedent, Mr. Stafford, had approximately 0.25 alcohol by weight in his blood which although was sufficient to show that he was intoxicated, it is in my opinion that it is insufficient to show that he was helplessly intoxicated. Based on all those facts, Your Honor, (6) I feel that the grand jury minutes do not support a murder charge against both of these defendants and in particular the one I represent, Mr. Kibbe.

The Court: Before proceeding further with the argument, I think it should be noted that the District Attorney appears, Mr. Robert Beer, and Mr. Charles Crimi and their respective clients, Roy Krall and Barry Warrant Kibbe. Is that the end of your argument?

Mr. Crimi: Yes, Your Honor.

The Court: What do you have to say?

Excerpt from State Criminal Trial—Pretrial Motion to Dismiss the Indictment.

Mr. Cornelius [Assistant District Attorney]: Your Honor, I have previously handed to the Court a copy of the minutes of the grand jury and I submit them to the Court in opposition to the motion to dismiss the indictment and I think the minutes speak for themselves and I can't add anything to them and I would respectfully submit they do support the charges in the indictment.

The Court: I have read the grand jury minutes. In general, what is your claim that these defendants or this defendant Kibbe has been shown to have committed such acts so that he can be accused of (7) murder.

Mr. Cornelius: Your Honor, I think that the grand jury testimony taken as a whole will show that these defendants on the night in question had with them in Mr. Kibbe's car, an individual who was; number one, highly intoxicated. I think that is borne out by the testimony before the grand jury. An individual who was apparently so intoxicated that at one point he in fact was refused service at a bar and that subsequently was driven to a location south of Rochester, a rural road, one upon which vehicles were passing and that this was the proof. I think further supports the fact that this was an extremely cold night and I believe the testimony was that it was around zero and the testimony supports the fact that the individual by the name of George Stafford, who was with these two defendants, after being struck and after money being taken from him, that various articles of clothing were removed; for example, boots were removed, the victim's pants were either removed or lowered and he was wearing only a shirt or outer shirt and his glasses were removed and in that (8) condition was placed by the side of this road where there was traffic, in this zero temperature and the car drove off. It is the People's position that in this intoxicated condition, half clothed, with no glasses, that this individual, the proof I think shows that eventually wound up in the road, raising his

Excerpt from State Criminal Trial—Pretrial Motion to Dismiss the Indictment.

hand, attempting to get help, which I would submit is the only thing that an individual in that position could do and should be within, certainly within the knowledge and within the expectations of the defendant who left him in that particular position and that in that position he was struck by a vehicle and killed. I think all of these factors taken together support the particular section under which they are charged. The charge is not one of intent to kill as is the traditional or more customary allegation of murder, nor is it one of felony murder, but it is one under a different subdivision that involves conduct which is reckless in nature and indicates a depraved indifference to human life and I submit that all these factors which I have mentioned, which I think are borne out by the grand jury (9) testimony, support this particular allegation of murder.

The Court: Coming to the point of robbery, what do you contend is the evidence tending to show guilt of those charges?

Mr. Cornelius: The evidence, Your Honor, of the forcible theft is evidence again, I think, borne out by the minutes of the grand jury that at least two $100.00 bills were removed from Mr. Stafford and one of which was actually removed by the Sheriff's department and admitted to by one of the participants as coming from the robbery in question. I think there is also evidence to show that both defendants admitted in their respective statements to the personnel from the sheriff's department that their intent was to rob this man when they drove him to that particular location.

The Court: Is there anything further you wish to say, Mr. Crimi?

Mr. Crimi: Well, Your Honor, in particular to the murder count, I, without having had the benefit of reading the grand jury minutes, from (10) what I was able to learn from the reading of the statement of both defendants, this decedent was placed by the side of the road, where in relation to where he was found is unclear, but at that par-

Excerpt from State Criminal Trial—Pretrial Motion to Dismiss the Indictment.

ticular point, at least as far as the being in a position to be hit by a motorist, it is not a proof of that at all in the grand jury minutes. I think that had they left him in the middle of the road, where he was found, then we would be presented with a different case, but having left him and as I understand it from reading the defendants' statements, both of them, having been left on the side of the road in which apparently he was left more or less on his own power at that particular point, that ends the activity of the defendants and its seems to me that it's highly attenuated to say that they at that time had any kind of an intent to be deprived and allowing that statute as to perceive that he was going to wander in the middle of the road and sit in the middle of the road in the position that he was when he was struck by a motorist. Although the District Attorney leans heavily on the fact that (11) this decedent apparently was intoxicated, by the same token when you are considering the perception of a substantial risk, you are also holding the defendants accountable to what a drunken person might do and a person might have done anything under the circumstances and he might have slept along the side of the road or may have walked into the street or may have done anything which I don't think they could really perceive to fall within that statute. It's a highly unusual set of facts and to some extent perhaps bizarre, but I think they are attenuated and I think that basically the facts are not really there to present it to a Jury. I might add, Your Honor, the facts are such so that it would be inflammatory, I think, and in a sense that if this does go to the jury, I think there is even though there may not be sufficient facts to sustain it, that there is grave danger that they might be convicted of this charge. I have nothing else to add, Your Honor.

The Court: In my opinion, the minutes of the grand jury are sufficient to warrant this indictment. I therefore deny your motion.

Excerpt from State Criminal Trial—Motion to Dismiss the Indictment at the Close of the People's Case.

(987) (Whereupon the jury was excused at 3:17 P.M. and the following transpired in the absence of the jury):

Mr. Beer [Co-defendant Krall's attorney]: At this time, Your Honor, at the close of the People's case I move on behalf of the Defendant Roy Krall for a dismissal for the indictment as to him. I am addressing myself as to the first count, (988) first of all, in which he is charged with the crime of murder. It's our contention that the People's proof has failed to prove the guilt of the defendant beyond a reasonable doubt as a matter of law in connection with that count. The proof had been shown that the cause of death of this defendant was severe injuries sustained through being struck by an automobile which the driver of which testified to operating it at a speed of 50 miles an hour in a 40 mile an hour zone. That he saw this form on the roadway when a hundred, two hundred feet away and made no effort to avoid it because, as he said, he was shocked and therefore did not apply the brakes and did not swerve his wheels in an effort to avoid this man. The defendant Roy Krall was under no obligation to anticipate a result like this. There was testimony that near the place where this incident occurred, as nearly as it can be fixed, there was a store and a gas station, both of which were open. That on the occasion of letting the deceased out (989) of the car the defendant Roy Krall could not be charged with evincing a depraved indifference to human life under those circumstances. And, it does seem that the People have not proven the guilt of the defendant of that crime beyond a reasonable doubt.

Also then, addressing myself to the second count, the crime of robbery in the first degree, there has been no proof in this case that the defendant Roy Krall caused serious physical injury to Stafford during the course of the commission of the crime of robbery or in immediate flight therefrom. Serious physical injury sustained by Stafford with or without cause or relationship to the actions of the de-

fendant was sustained some time after the defendant had left the area where this incident occurred. Therefore, I do not see how the count of robbery first degree could hold up as a matter of law.

I move for a dismissal of those counts of the indictment.

The Court: Just the first two counts?

(990) Mr. Beer: Yes.

Mr. Crimi [Kibbe's attorney]: First off, Your Honor, let me say that because I live in mortal fear of what Appellate Court do, I keep repeating, and I don't know whether they are necessary or not, and I don't want Your Honor to take either offense or be annoyed by it, but I keep repeating my objections to the pre-trial motions. But, it's only done as I say, in sort of a fear of the Appellate Courts. So that my first thing I would like to do is to renew each and every motion that I made prior to trial as such and leave that in the record as to that.

Now, I make a motion to dismiss as to the Defendant Barry Warren Kibbe as to the counts in the indictment and I would like to speak of count 1, first.

Count 1, Your Honor, is a count which charges Barry Kibbe with the crime of reckless homicide. This particular type of homicide deals with a homicide which is brought about by accidents of individuals without intent. (991) It has been on the books for a great number of years and has caused to some degree some legal discussions relative to its enforcement. When the Code, the Penal Code was recodified or changed in 1967 the revisors, at least one set of revisors' notes seem to indicate that this Section embody the law pretty much the way it was prior thereto, prior to the revision. The law prior to the revision of this particular section seems to indicate that in order to be guilty of this crime an individual would have to have a degree of depravity toward the whole human race and then would show it by an indiscriminate use of conduct toward any-

body and without picking out any individual. So that we find in the old case of Darry -vs- The People, 10 N.Y., 10, which was way, way back in which the Court of Appeals said: "What you needed was either an intent to kill anybody or you did not need any intent to kill but the act had to be dangerous to many people." In this particular case we don't these facts. We have the acts, (992) if anything, are directed entirely to one individual.

Now, the question comes up, and I can't find any cases and I will be perfectly honest with the Court, I don't know if there has ever been a case that has gone to trial since 1967 and reported, because I was not able to find one. The question comes up as to whether or not that case, the Darry case and People -vs- Jernatowski, 238, N.Y., 18, which was a case where an individual, I think shot into a house and somebody got killed but again he was not directing it to anybody, he was really directing his whole fire against a class of people rather than an individual. The question is whether or not those cases still pertain since there hasn't been a revision.

I think in all fairness that the chances are that part of it has been retained and part of it hasn't. I think your act of depravity today has to be a type of act which is directed toward all mankind, but I think today it's possible to have the act in the (993) last analysis be directed against another person as the statute says. So, I think the first thing we have to look and see whether or not these acts were acts which showed a depravity of mind toward all of humanity in that sense rather than just toward this individual named Stafford.

Now, in reviewing the proof in the backlight of that—before I do that, from what I have been able to find out, there are certain elements that must be proven by the People, and of course the first one is depravity. I think in the depravity that conduct must evince a depraved indif-

ference to human life. Secondly, they must find that he engaged recklessly in the conduct and not carelessly, but recklessly, that there must have been a substantial and unjustifiable risk which each defendant was aware of.

Now, here is where we get hung up, Your Honor, because it would seem to be that recklessly means that the defendant has to be aware of a substantial and unjustifiable risk (994) and he must consciously disregard it. And in reviewing my notes last night as to the chief testimony here of the motorist who struck Mr. Stafford, it seems to be that it is not possible, there is no proof beyond a reasonable doubt that these individuals could have possibly perceived that by leaving an individual by the side of the road, albeit he was drunk, that he then would sit in the middle of the road facing traffic with his hands up, as the witness said. Now, he's not lying down or anything. He's sitting in the middle of the road with his hands in the air and apparently he had to walk some distance there and then have a motorist exceed the speed limit, freeze at the wheel, not brake, not swerve and have his attention distracted by an oncoming car, and also over and above that, he himself said that he had at the time the low beam lights on. It seems to be to impose upon any individual the ability to foresee that all of these things would happen to somebody that they left at the side of the road is impossible, and I don't think (995) that it has been proven. Nor for that matter, I don't think this is the law for this case, and I don't think it really could ever be proven.

The causation between leaving an individual, even if he were drunk, even if we accept as true that he was robbed, and any of the other facts, to say that they could perceive what was going to happen as it happened—I can't see it. Because, sure, they could perceive that perhaps he might have frozen to death, but he didn't freeze to death. Perhaps they could have perceived that he may have stumbled and wandered into the road and fallen flat on his face, but that would be in a different fact. Here you have an individual who was intoxicated and for reasons that we'll never know, decided to sit right square in the middle of the highway with his hands up, and it's not really a position of help as much as it might be. Maybe he was ornery, I don't know. But at any rate, then you have a car going 50 miles an hour. No attempt to (996) stop. No braking. No swerving. The unfortunate motorist froze at the wheel, he was distracted. He was caught at a time when his low beam lights were on. All of those things, seems to me, indicate that this just isn't the type of charge for this particular case and I feel that the People have not proven this. And even if we look at the defendant's confessions through the confessions, there are statements in there where the man tripped and he was helped up. There are statements there that the car was, that they were left off near a gas station, near lights. So, it just doesn't seem to me that you can say, well prosecution can use only those parts of the statement which are beneficial to the prosecution and we have got to disregard those parts which are not beneficial. They chose to put the statement into evidence. There is exculpatory material in the statement and I think on this particular point they weigh level.

That is my motion in regard to the first (997) count, that it should be dismissed on the ground that there really is not sufficient proof to have this brought to a jury. And frankly, I would say that it's probably a count that should never have been placed against these defendants because of its difficulty of being able to be proven. And that is why it just can't be proven, because I think the type of case that this calls for is a type of case where an individual takes it on himself, is mad at humanity and takes it upon himself to throw a grenade into a crowd or going down

Main Street at 90 miles an hour and smashes into a crowd who is assembled or something like that sort where there is that depravity of mind toward human life.

Now, my second motion, Your Honor, is directed to the second count of the indictment and there my reveal of the evidence would seem to indicate that there has been no proof of any serious physical injury as it is defined in the Penal Law, the robbery which allegedly took place. Now of course, there (998) obviously were substantial injuries, but of course those injuries were all caused by the unfortunate accident that occurred after the alleged robbery.

I think I should say one thing else, Your Honor. We know that through the circumstances of what happened that night that there has been an individual who was killed, and I think that the Court should consider the possibility that if in case this has not, as I suggested to the Court, been proven, that the jury could run away with this type of act, and therefore, I urge, that the murder count be dismissed and robbery first degree be dismissed.

As to the third and fourth counts, as to the robbery second degree, I don't think at this point it has been proven beyond a reasonable doubt that there was a felonious and forceable taking.

And as to the fourth count—as to the last two counts, I just move to dismiss without argument as to the last two counts, Your (999) Honor.

The Court: What do you have to say, Mr. Cornelius?

Mr. Cornelius [Assistant District Attorney]: Your Honor, both arguments seem to be addressed primarily to the first two counts of the indictment and I will likewise address my remarks to the first two counts of the indictment.

I disagree with Mr. Crimi's interpretation of Section 125.25, sub. 2 for a couple of reasons. I don't believe that the law provides or the case law under the subdivision 2

at the present time stands for the proposition that there has to be an intent or, I should say, an indifference to human life in general. It seems to be that I have, it's either this section or a section very similar to this where this very thing was discussed and it indicated, if my memory serves me correctly, that the Section, the new Section, whatever may have been the law before applies to acting with depraved indifference to a human life. In other words, he need not be (1000) so broadly construed as Mr. Crimi has stated. I think aside, however, from that argument, I have also been taught that the best evidence of what a section or a piece of legislation means is the plain meaning of the statute. In other words, if the wording is plain, that it would seem to settle the situation. I think subdivision 2, I don't think that can be any more clear. It states under circumstances evincing a depraved indifference to a human life he recklessly engages in conduct which creates a grave risk of death to another person; not on the people,—not on the person's—not on a group of people—not a crowd but to a person. I think the clear meaning, if there was any doubt about it, I think the clear meaning of the new section would limit—or need not limit it, but I think it can apply with acting with depraved indifference to a single human life in addition to the situation Mr. Crimi mentioned of a crowd of people or humanity in general.

As to the argument that the defendants (1001) had not been brought within the purview of recklessly causing the death because they could not have possibly perceived or apprehended that the possibility existed of this man's demise under the circumstances in which he was unfortunately killed again, I have to disagree with counsel. I think that the case and the facts and the evidence up to this point proves more than just dropping a man off, an intoxicated man off in the side of the road and then having him wander into the roadway as an unforeseen consequence. I

think there is a lot more, much more indeed to this case, because we have a situation when not only was the man intoxicated, the weather was extremely cold. Even the statements of the defendants, or at least one of them, refers to the fact that it was freezing and said, "You best get inside or you'll freeze to death." I think that shows a cognizance on their part or at least one of their parts that it was cold out there and that he better get to someplace. The area in which he was dropped off, is, I don't (1002) think, and the witnesses are all fairly consistent on that, that at that particular area, it's an open area, a field, and that there is a gas station or a store, but it's about a quarter of a mile north of this particular location. So, logically, if a man were, as Mr. Crimi stated in a statement, you better get to the store or gas station before you freeze, logically, the only way to go would be up the road. Then in addition to all those factors you have a situation where this man was not fully clothed. It's one thing to put an intoxicated man, rob an intoxicated man and put him on the side of the road and it's quite another thing, I think, to either have him strip down or lower him, apparently some of his clothes were removed, his jacket was off, and his boots were off, even though one of the defendants gratuitously opened the door and placed them back in the snow. Nonetheless, he was an intoxicated man with his boots off and then in addition to that fact we have a situation where we have a man in the case of (1003) Mr. Stafford, according to one of the witnesses, couldn't see without his eyeglasses, and I think the People have proved that in addition to the money that may have been taken and the other personal property that may have been taken, his eyeglasses were also taken and they were found subsequently in one of the defendant's automobiles. So, I think combined with all those facts you have a situation where you have a man who can't see. I think especially

under all these facts that I have mentioned and some that I have not mentioned—unlike Mr. Crimi, I fail to understand how a person could not percieve the risk of death occurring in the manner in which it did occur. I think that the awareness of these facts are borne out of the statements of the two defendants. I have already mentioned that I think at one point Mr. Crimi said in his statement that I told the man he better get inside or else freeze to death, both of them admitted that they knew the man was intoxicated. Kibbe admitted that his clothes were partially off. (1004) So, I think there is enough here based on their own statements that they were aware of many of the facts and many of the circumstances.

As to the cause of death, again, I think under the case law which I forgot to bring with me this afternoon, but there are a line of cases on the question of causation of death, and I don't think the law stands for the proposition that to be held responsible the person has to be the sole or only cause of death. But if there is a direct connection or if there is a proximate cause between the acts or the actions of the defendant, and the ultimate death, then that individual is and can be held responsible for the death. And I think here much of what I already said applies to that. True, the preceding and direct result of Mr. Stafford's death was the truck driven by Mr. Blake, but of course the fact is that Mr. Stafford wound up in the position in which he found himself because of the actions of both of these de- (1005) fendants.

As far as the second count is concerned, the criticism or the claim has been made that there is no proof of serious physical injury either during the course of the commission of the crime or the immediate flight therefrom. My answer to that is that under the definition of serious physical injury, that death of a person, that that comes within the purview of serious physical injury and defined in the Penal

Excerpt from State Criminal Trial—Motion to Dismiss the Indictment at the Close of the People's Case.

Law and I think it's a question of fact whether or not, assuming that I am correct, that there is the causation, proof of causation here. I think it's a question of fact for the jury then to decide whether or not this man's death was caused during the immediate flight from the commission of the crime. I think that there is sufficient evidence to present to the jury on that question because we have testimony that the man left the bar with these two defendants somewhere in the area of 9:30, by their own statements and they went to a (1006) couple of other places and they went on East Henrietta Road, drivers were changed and then they went to East River Road where this incident occurred. We then have testimony that the accident or death occurred probably about, shortly after 10 o'clock, around 10:10, so I think the time is sufficiently close to allow the question to go to the jury on the question of whether or not the causation of death which is, as I say, rests upon my assumption that my argument is correct, whether or not that was within the immediate flight of the robbery or getaway car.

The Court: To sustain the crime of robbery in the first degree you are depending upon the fact that this victim was in fact killed and that in itself constitutes serious physical injury?

Mr. Cornelius: Yes.

The Court: And as part of the charge or the claim, it seems if I follow your argument, that you argue that he was killed during the course of the immediate flight (1007) of the defendants from the crime or from the scene where the crime was committed?

Mr. Cornelius: That's correct.

The Court: Not that the actual injuries caused at that time were serious, I mean, the slapping of the face and so forth, those are not—those cannot be considered serious physical injury?

Excerpt from State Criminal Trial—Motion to Dismiss the Indictment at the Close of the People's Case.

Mr. Cornelius: That's right. Let me say, that is my argument, or to again repeat, that I think there is sufficient evidence to present to the jury a question of fact whether or not it was within the immediate flight therefrom.

The Court: Motions made by each defendant respectively are in all respects denied.

Mr. Crimi: Exception.

Mr. Beer: Exception, please.

Excerpt from State Criminal Trial—Renewal of Motion to Dismiss the Indictment at the Close of the Entire Case.

(1090) Mr. Beer [Co-defendant Krall's Attorney]: At this time, Your Honor, at the close of the entire case I renew the motions I made at the end of the People's case and at this time, I move for a dismissal of all the counts of the indictment against the Defendant Roy Krall on the grounds that in each of these counts the People have failed to sustain the burden of proof imposed upon them by law of proving the guilt of the defendant beyond a reasonable doubt as a matter of law and insufficient evidence to go to the jury as against the Defendant Krall on any of these counts.

The Court: Denied.

Mr. Crimi [Kibbe's Attorney]: Your Honor, I repeat the same motions I made at the end of the People's case or motions I should say at the end of the People's case based on the grounds that (1091) there has been a failure of proof, particularly as to the first count of the indictment and the second count of the indictment and that the Judge should dismiss those two counts, Your Honor.

The Court: Denied.

Mr. Crimi: Exception.

Excerpt from State Criminal Trial—Court's Opening to the Jury.

(578) The Court: I think there is time for me to give the preliminary charge this afternoon. Members of the jury, at this time I am required by law to instruct you generally concerning your basic functions, duties and conduct and to acquaint you in a general way with the trial procedure and certain rules which apply to every juror so that you will better be able to assess and weigh the evidence as it is presented and reach a proper verdict. The trial is commenced with the selection of the jury, the next step in the trial is an opening statement by the People, represented by the district attorney during which he is required by law to indicate to you what he intends to prove by way of evidence to support the charges set forth against the defendant. Subsequent to that, (579) defense counsel, if they desire, may also make an opening statement and what counsel for either party says in an opening statement is not evidence. You may consider the opening statement as a preview of what each side intends to prove in the case.

After the opening statement or statements, the district attorney will call a witness or witnesses who will be questioned by him. This is called direct examination. After the district attorney completes his questions, defense counsel will be given an opportunity to question the witness. This is called cross-examination. After the People have concluded the calling of their witnesses and the introduction of any exhibits which are admissible into evidence, the defendant may offer evidence in his defense. After the defendant rests and the People rest, when I say defendant singular, I mean each of these two defendants. The defense may make a closing statement following which the People may make a closing argument. Then, I will charge you or instruct you on the law and (580) you will retire to deliberate for the purpose of reaching a verdict. That is the general outline of the trial procedure. For the most

part, evidence consists of testimony of witnesses under oath and exhibits which are received in evidence. Questions in and of themselves are not evidence, therefore, you cannot infer any fact from the mere asking of a question. It is the answer coupled with the question which constitutes evidence. For example, if a witness were asked the question "You own an automobile?" and the witness answered "No," you may not infer from the mere asking of the question that the witness does own an automobile.

During the course of the trial, either attorney, the district attorney or defense counsel, may object to a question or answer on the grounds that it is somehow legally improper or inadmissible. If I sustain the objection, that means that I believe the question or the answer was in some manner improper. Therefore, in the first instance, the question may not be asked and in the second instance if the answer (581) has been given, it is stricken out and therefore the answer is no longer evidence in the case. If I overrule the objection, then it means that the question is proper and I will permit it to be answered or if already answered, I will permit the answer to stand as evidence in the case.

Please do not resent the fact that either attorney makes objections. This is their duty and do not hold it against either attorney if I rule against him. As I will explain to you in detail in my charge as jurors in the case, you are the sole judges of the facts. I am the sole judge of the law. You must accept the law as I give it to you without hesitation or reservation even if you privately disagree with me. You must keep an open mind. You must not converse among yourselves or with anyone else upon any subject connected with the trial. You must neither offer nor express an opinion as to the guilt or innocence of the defendant or either of them until I finally give the case to you. You must not read or listen to any accounts or (582) discussions of the case in the event that it is reported by

newspapers or other media. You must not visit or view the premises or place where the events or offenses charged were allegedly committed or any other premises or place involved in the case. You must properly report to the Court any incident within your knowledge involving an attempt by any person improperly to influence any member of the jury.

On Monday morning we'll proceed with the next step in the trial which is the opening statement by the People. We will not recess until Monday morning. Keep in mind I say Monday, Tuesday is a holiday and Monday we will have Court as usual. So, we will recess until ten o'clock Monday morning. In the meantime, please do not discuss this case among yourselves or with any other person. Report back here at ten o'clock on Monday morning. You may step down.

Excerpt from State Criminal Trial—Portion of Opening Statement by the People.

(607) [Mr. Cornelius, Assistant District Attorney]:

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To go back to the first count, for example. I said to you that the People will prove the circumstances of evincing a depraved indifference to human life, recklessly engaged in a conduct which ultimately caused the death of Mr. Stafford. It will be the People's position, and there will be proof here offered by the People, that putting all these things together the fact that Mr. Stafford was intoxicated; that he had his money; had his personal property taken away from him, had his boots off, that all of these circumstances, putting them together indicate evincing a depraved indifference to human life and ultimately the cause of death was the accident which resulted in Mr. Stafford's death.

I sometimes think it is important not only to say what the respective parties of the lawsiut will prove, but also what they will not prove. There will be no allegation in this case, I think there is no intention on my part here nor will there be any proof, that there was any intent to cause the death of Mr. Stafford. (608) In other words, when the two drove off, but the People will show, however, what they will prove is that these two men in the condition that Mr. Stafford was in, and under all these circumstances, the weather, the clothing, that they evinced a depraved indifference to human life in leaving the man in that condition on that road and driving off. And secondly, that their acts, perhaps it was not the sole cause of death, because quite obviously, the direct or precedent agent of the catalyst causing the death was the truck driven by Mr. Blake. But nevertheless, their acts were responsible and were a cause, an approximate cause of the death of Mr. Stafford.

I think one final aspect of the case that I would want

to mention, and that is, that I mentioned to you that during the course of the drive from the City of Rochester out to the Town of Henrietta, that Mr. Krall, the proof will show, that Mr. Krall was driving the automobile and Mr. Kibbe was seated in the front seat. I think the proof will show that many of (609) the things that happened, the taking of the money, the clothes being removed or altered, the boots or so forth, were done by Mr. Kibbe. However, the evidence will show that Mr. Krall was driving the automobile and the People will contend, and if it is the law, I will ask you to consider that anybody who aids somebody else is equally guilty. So, the proof will show that while Mr. Krall did not physically engage in the same act that Mr. Kibbe did, in the sense that he did remove the boots or took the money and so forth, nevertheless, having the same intent, the same frame of mind, the same intent to commit the crime of robbery, that he aided him by driving the vehicle which ultimately placed Mr. Stafford in the position where he was placed.

I submit, members of the jury, that upon conclusion of the evidence that the proof will convince you beyond a reasonable doubt that the acts of these two men, Mr. Krall and Mr. Kibbe, were responsible for the loss of a human life for the circumstances set forth in the first (610) count of the indictment and also convince you beyond a reasonable doubt that the crime of larceny as alleged in the indictment were also committed by the two men who stand before you.

Thank you.

Excerpt from State Criminal Trial—Testimony of Michael Blake.

(616) MICHAEL W. BLAKE, called herein as a witness on behalf of the People, having first been duly sworn, was examined and testified as follows:

Direct-Examination by Mr. Cornelius [Assistant District Attorney]:

Q. Your full name is Michael W. Blake? A. Yes, sir.

Q. Mr. Blake, would you state your address? A. I live at 379 Fairwood Circle, Rochester.

Q. Is that your permanent address? A. No, it is not.

Q. Whereabouts do you come from originally? A. I come from Martinez, California.

(617) Q. And would you tell the Court and jury what you are doing in the Rochester area? A. I attend school at the Rochester Institute of Technology.

Q. And what year are you in? A. This is my senior year.

Q. What school are you enrolled in? A. Photography.

Q. Mr. Blake, I ask you to recall back, if you would, to last December of 1970. Whereabouts were you living at that time? A. 134 Greenmore Way, Henrietta.

Q. And at that time, Mr. Blake, did you own any type of vehicle? A. Yes, I did.

Q. Would you tell us what? A. I owned a 1965 Chevrolet half ton pickup.

Q. Mr. Blake, specifically recalling back to December of 1970, December 30th, of 1970 can you tell the Court and jury where you were at approximately 10 o'clock in the evening of that day? A. I was at home at 10 o'clock.

Q. And what occurred thereafter? A. I received a phone call and left home to drop off some (618) photographic prints to a friend of mine who lives on Scottsville Road.

Q. What route did you take? A. Leehigh Station Road to East River Road and then right on East River Road and went north on East River Road.

Excerpt from State Criminal Trial—Testimony of Michael Blake.

Q. Do you recall what kind of night it was? A. It was a clear night and it was very cold that night and there was wind blowing intermittently.

Q. Tell the Court and jury in your own words what happened after you turned right on East River Road. A. After I turned right I proceeded north on East River Road and passed Bailey Road and I saw two cars approaching me going south on East River Road. When I saw these cars coming toward me the car in front appeared to be flashing its headlights and then immediately after I saw him flash his headlights and he passed me I saw a person sitting in the road, in the middle of my lane with his hands up on the air like this and I struck this person and continued on letting him pass underneath my truck. Then I stopped and got out to look and see if I could see him and I couldn't see him because it was too dark. So, I got back into my truck and I turned it around and came back southbound in the northbound lane and parked (619) in front of him so my headlights were shining on him so I could see him and I turned on my emergency flashers and went out of my truck and went up to see what had happened.

Q. Can you tell us what part of your vehicle or truck came in contact with the individual? A. The center of the truck, the bumper and the grill.

Q. And do you know approximately how fast you were going? A. I believe I was going about 50 miles an hour.

Q. After you turned your truck around and exited from your vehicle, can you describe to us the individual you observed in the road? A. He appeared to be a middle aged caucasion. What he was dressed with?

Q. Yes. How was he dressed? A. He appeared to be wearing a pair of pants that were down around his ankles. He had skivies on and he had a shirt on that was pulled up around his chest.

Q. Could you observe any injuries at that point? A. Yes, I could. He was bleeding from the head.

Q. What occurred thereafter? A. Apparently the person that had flashed his headlights had come back and other passers-by were coming along and I requested someone to get help and somebody left to get (620) an ambulance and then the ambulance and the police arrived, the Monroe County Sheriff. And, there was another gentleman that stopped and he helped me cover up this person that was laying in the road.

Mr. Cornelius: Your witness.

Cross-Examination by Mr. Beer [Krall's attorney]:

Q. Did you testify before the grand jury, Mr. Blake? A. Yes, I did.

Mr. Beer: May I see those, Mr. Cornelius?
Mr. Cornelius: Yes.

Q. Mr. Blake, you say your speed on East River Road was about 50 miles per hour? A. Yes, I believe so.

Q. And for how long a time had you been on East River Road before this accident in question? A. Well, from the time that I turned off of Leehigh Station Road.

Q. And how much time would have elapsed? A. I really don't know.

Q. Well, would it be a minute or three minutes or five minutes or what? (621) A. I would say probably 3 or 4 minutes.

Q. And was the pavement dry? A. Yes, it was.

Q. And the weather was clear? A. Yes.

Q. And while you were going north on East River Road did you have clear visibility? A. Fairly clear. There was an occasionally gust of wind that blew snow over the highway.

Q. But that was not a steady thing? A. No.

Q. There was no snow or ice on the pavement? A. Just what was blowing over it.

Q. And while you were going up the East River Road did you have your high beam or low beam lights on? A. I had my low beams on when the cars approached me. Before that I had my high beams on.

Q. And how many cars passed by you going in the other direction before the accident? Do you have any idea? A. From the time that I turned off—

Q. Yes. A. Well, from the time that I passed Bailey Road there were only two; before that I don't recall.

(622) Q. And how far past Bailey Road did this accident occur? A. It's about a quarter of a mile.

Q. After you saw this figure in the road did you apply your brakes? A. No, I don't recall whether I did. I went into a kind of a shock as soon as I saw him.

Q. So, to your best knowledge you did not apply your brakes? A. No.

Q. How far away from him were you when you saw him? A. I would guess about a hundred feet, two hundred feet; it's hard for me to tell because of the cars coming towards me and how quickly it happened.

Q. Did you attempt to swerve your car in either direction in an effort to go around this figure? A. I didn't have time to react.

Q. Would you place this person as being about in the middle of the highway? A. No, he was in the center of my lane.

Q. And what is that a two lane road? A. Yes.

Q. Did you drag this person any distance with your vehicle? A. Yes, I did.

Q. About how far? (623) A. From what I understand it was about 400 feet.

Q. How far? A. 400 feet is what I recall.

Mr. Beer: No further questions.

Excerpt from State Criminal Trial—Testimony of Michael Blake.

Cross-Examination by Mr. Crimi [Kibbe's attorney)]:

Q. Mr. Blake, had you traveled that road frequently? A. Well, about twice a week.

Q. Is that the way you go to school? A. No, I don't.

Q. But about twice a week—how long have you been in Rochester prior to December 30th, 1970? A. A year and a half.

Q. So, had you lived in that area close to the school in the year and a half time? A. Yes, I did.

Q. And I take it, Mr. Blake, that you are in Rochester because you are going to school; isn't that correct? A. Yes.

Q. So that twice a week or so you would travel this particular East River Road; is that correct? A. Yes.

Q. And I believe you testified that this accident took place (624) north of Bailey Road; is that correct? A. Yes.

Q. You were traveling north; is that correct? A. Yes.

Q. Is there in that area any gasoline station? A. Yes, there is.

Q. And where is that gasoline station? A. It was about a mile or three-quarters of a mile from Bailey Road going north.

Q. All right. And it would be a shorter distance, would it not, from where the point of impact was; am I correct? A. No, I'd say it was about half-way between Bailey Road and the gasoline station.

Q. I see. So, the gas station would be north of where the impact occurred? A. Yes.

Q. Would it be on the same side of the street? A. No, it would be on the other side of the street if you are traveling north.

Q. Did you see the gas station that night at all? A. Yes, when I parked my car there.

Q. Okay. And how far was the gas station from the point of impact? (625) A. About a little over a quarter of a mile.

Excerpt from State Criminal Trial—Testimony of Michael Blake.

Q. Now, north of the gas station is there another store there or is there a store there? A. Yes, there is.

Q. And what time was this that this happened? A. 10 in the evening.

Q. And did you see that store there that night while you were at the gas station? A. I don't recall noticing it.

Q. Now, Mr. Blake, you came out into East River via Leehigh Road? A. Leehigh Station Road.

Q. Leehigh Station Road? A. Yes.

Q. And how far is it from Leehigh Station Road to Bailey Road? A. Approximately a mile.

Q. I take it the weather was clear as you said and so I take it that you didn't have your windshield wipers going; is that correct? A. That's correct.

Q. There was no need for windshield wipers? A. No.

(626) Q. As you were proceeding along north and I think you testified either a hundred or two hundred feet before you noticed this object on the road; is that correct? A. Would you repeat that, please.

Q. Strike that question out. How far were you from this object when you first viewed it through your windshield? A. It's very difficult for me to estimate because it was an instantaneous sort of thing when the cars were coming toward me and then I saw him. It's very difficult for me to say how far.

Q. Well, can you try? A. It was somewhere between one hundred and two hundred feet.

Q. It was about two hundred feet when you first notice it and I understand your testimony is that you were shocked by this sight and you don't recall braking the truck; is that correct? A. That's correct.

Q. Now, this was a half ton Chevrolet truck; is that correct? A. Yes.

Q. Do you know how much this weighs? A. Approximately 3,500 lbs.

Excerpt from State Criminal Trial—Testimony of Michael Blake.

Q. And returning now to this object. This object when you (627) first saw it was not lying flat on the surface of the road; is that correct? A. Yes.

Q. The object was at least in part standing up; is that correct? A. He appeared to be sitting.

Q. Sitting, but the other part of his body, if he was sitting, would be visible to you; is that correct? A. Yes.

Q. And was this object sitting facing your truck as it was coming along or was it facing crosswise? A. He was facing directly towards me.

Q. So that this object then was sitting in the road facing the traffic coming north? A. Yes.

Q. I take it, Mr. Blake, that you did not see this object until after cars passing you coming from the south were flashing their lights; is that correct? A. The cars that were heading south, I saw him immediately after they passed.

Q. Immediately after they passed you? A. Yes, passed me.

Q. And they were flashing their lights? (628) A. The first car was, yes.

Q. Well, how many cars passed before you saw the object in the road? Two? A. I believe there were two. The first car passed me— I saw the headlights coming and immediately after I passed this car I saw this person sitting in the road. Now, the second car was behind the first car, directly behind him. Now, whether he passed me before I saw him or not, I don't know.

Q. All right. The second car, as it passed you, had you at that time struck the object; if you remember? A. I don't know.

Q. You don't know? A. No.

Q. Of course, when you first saw this object in the road, you were not able to observe the clothing or how the clothing was being worn; could you? A. I could only tell that it was light colored.

Excerpt from State Criminal Trial—Testimony of Michael Blake.

Q. I see. It was only after the accident, and only after the person had been dragged a number of feet that you were in a position to observe that his pants were down at his ankles and that his shirt was rolled up; is that correct? (629) A. Yes.

Q. Incidentally, was he wearing light colored clothing? A. It appeared to me that he was.

Q. You say it appeared to you. You had an opportunity to see it; did you not? A. After I came back, yes.

Q. Yes. Well, was it light or wasn't it? A. It appeared to be. I just—

Q. Okay, Mr. Blake, I take it that you struck this person almost dead center with your truck; is that correct? A. Yes, I did.

Q. Was there a lot of damage to your truck? A. Well, damage to the grill beyond repair.

Q. And when you struck him he was still sitting, was he, and facing the truck; is that right? A. Yes.

Q. You traveled that road about twice a week; is that correct? A. Yes.

Q. For a period of about a year and a half; is that correct? A. Yes.

Q. What is the speed limit there, Mr. Blake? A. At that point?

(630) Q. Yes. A. 40 miles an hour.

Mr. Crimi: Thank you.

Mr. Beer: No further questions.

Mr. Cornelius: Mr. Blake, you testified with respect to one of Mr. Beer's questions what you thought the number of feet was that the person was dragged. Do you know that of your own personal knowledge?

A. No.

Mr. Cornelius: I have no further questions.

Mr. Beer: No further questions.

WITNESS EXCUSED.

Excerpt from State Criminal Trial—Portion of Testimony of Deputy Sheriff Terrence Cooper.

(646) • • •

[Assistant District Attorney Cornelius]:

Q. What type of measurements did you make?

[Terrence Cooper]:

A. I made a measurement from RTC Pole—Rochester Telephone pole No. 215. The body was laying 50 feet 11 inches south of the pole and approximately 11 feet 4 inches from the side of the road in the middle of the highway.

Q. Now, this is telephone pole No. 215? A. Yes, sir.

Q. And where is that telephone pole in relation to Bailey Road? A. It's approximately one-quarter of a mile north of Bailey Road.

Q. And are you also familiar with telephone pole 216? A. Yes.

Q. Where is pole 216 in relation to pole 215? A. It's 125 feet south of 215 pole.

Q. So, as you are going northbound there would first be Bailey Road and then approximately a quarter of a mile pole 216 and then north of that 215? A. Right, sir.

(647) Q. All right. Now, again, if you would, Deputy, whereabouts in relation to poles 215 and 216 was the body? A. It was approximately 50 feet—50 feet 11 inches south of 215 pole.

Q. Would that be between pole 215 and 216? A. Right, approximately between.

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(649) [Attorney Beer]:

Q. Deputy, what is the speed limit in that area where the man was found? A. 40 miles an hour, sir.

Q. And was there not a gasoline station some distance north of the place where the man was found? (650) A. Yes, sir, some distance north.

Q. How far? A. Approximately half a mile.

Q. Wouldn't it be around four or five hundred feet from there? A. No, sir, I believe it's about a half a mile.

Excerpt from State Criminal Trial—Portion of Testimony of Deputy Sheriff Terrence Cooper.

Q. Do you remember testifying before the grand jury in this matter, Deputy? A. I remember testifying before the grand jury, yes.

Q. Do you remember this question being asked and this answer being given? Top of page 25. "Q. Specifically, can you tell us what section of East River Road you went to with respect to other roads in the vicinity?" Do you remember that question being asked? A. Yes, sir.

Q. And do you remember this answer being given: "A. The area was about a quarter mile north of Bailey Road and it was approximately four or five hundred feet south of the Sunoco Station which is on the corner of River Meadow Heights." Do you remember that answer? A. I remember the quarter of a mile, sir, but I don't remember the 500 feet.

Q. Isn't it a fact that there are some stores in the vicinity (651) of where you found that body? A. The stores in the vicinity are north of the gas station. There's only one store there.

Q. And is that store at the intersection of Bailey Road and East River Road? A. No, sir.

Q. Where is it then? A. It's at the corner of River Meadow and East River Road.

Q. Is that a grocery store, delicatessen store? A. Yes, it's a delicatessen.

Q. And where is this other intersecting road that you mentioned with reference to where you found the body? A. It's just on the other side of the Sunoco station which is north of that area.

Q. Just 50 feet beyond it or so? A. Probably closer to 90 or 100 feet.

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(655) [Attorney Crimi]:

Q. Now, as you are proceeding north from Bailey Road

Excerpt from State Criminal Trial—Portion of Testimony of Deputy Sheriff Terrence Cooper.

on East River Road, there is north of that a Sunoco Station; isn't that correct? A. Yes, sir.

Q. And that is on the opposite side of the street where the body was found; the opposite side of the road; isn't that correct? A. Yes, sir.

Q. And do you have any recollection now as to how far that Sunoco station is from the point of impact? A. As I stated before approximately a quarter of a mile.

Q. A quarter of a mile. Okay. Did you have occasion to go in that gas station that night? A. Yes, sir.

Q. Did you talk to anybody in that gas station? A. Yes, sir, I believe I spoke to the attendant.

Q. So, I take it that the gas station was open; is that correct? A. Yes, sir.

Q. It's a Sunoco station; is that correct? A. Yes, sir.

Q. And it's quite a large station; is it not?

(656) Mr. Cornelius: Objection.

The Court: Sustained.

Mr. Crimi: The station—

Mr. Cornelius: Objection, Your Honor. What relevancy is this?

Mr. Crimi: Well, the relevancy—

Mr. Cornelius: Well—

Mr. Crimi: Do you want me to explain what the relevancy is?

Mr. Cornelius: No.

The Court: I will overrule the objection.

Q. Can you describe it? A. It's a gas station with two islands to pump gas.

Q. And it has lights; does it not? A. Yes, sir.

Q. And on the same side of the road and directly north of that is a supermarket; isn't that true? A. Yes, sir.

Q. And did you observe it that night? A. No, sir, I can't say that I did.

Excerpt from State Criminal Trial—Portion of Testimony of Deputy Sheriff Terrence Cooper.

Q. Now, Deputy, returning to the side of the highway on which the body was found. Is there not also other (657) business establishments, I believe it's a rug company? A. That is north of the area.

Q. North of the area? A. Yes, sir.

Q. But it's also between Bailey Road and East Meadow Road; is that correct? A. It's almost at the intersection of River Meadow Road.

Q. So, that there are at least three business establishments between Meadow River Road and Bailey Road; is that correct? A. Yes, sir.

Q. So, it's not all farmland; isn't that correct?

Mr. Cornelius: I object to the form of the question. There is no testimony that it was.

Mr. Crimi: Oh, yes. I thought there was.

The Court: Sustained.

Mr. Crimi: Well, excuse me.

The Court: You can have the Deputy describe the land, if he is able to.

Q. Did you not testify that there was open field territory there? A. Yes, sir, adjacent to the accident scene.

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Excerpt from State Criminal Trial—Portion of Testimony of Dr. John Edland, Medical Examiner.

(671) Cross-Examination by Mr. Beer (Krall's attorney):

Q. Doctor, did you say that the skin on one of the arms was torn and that the bone was exposed? A. Yes.

Q. Would that finding have been consistent with the body being dragged along the pavement? A. It looked like one of the shearing-type injuries where the soft tissue was actually torn and sheared.

Q. Were there any injuries on there which would indicate that he may have been dragged for some distance? A. This is difficult to say, Mr. Beer. He does have several of these skid-like marks over his body. It was very difficult to say if he was dragged or not. It's possible.

Q. Do you remember at the grand jury this question being asked by one of the jurors: "Q. Was he run over by the truck? A. It loked like he was struck and then dragged for some distance." Do you remember that? A. No.

Q. You said that there was .25 amount of alcohol in the blood? A. Yes.

(672) Q. Does that indicate a degree of intoxication? A. A very heavy degree of intoxication, yes.

Q. A high degree of intoxication? A. Yes.

Mr. Beer: That's all.

Cross-Examination by Mr. Crimi (Kibbe's attorney):

The Court: It's .25%; isn't?

A. Yes.

By Mr. Crimi:

Q. Dr. Edland, the skid marks, could you describe what you mean by "Skid marks?" A. These are abrasions, patterned-type of abrasions on the skin that could have been caused by a tire or possibly by being dragged.

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Excerpt from State Criminal Trial—Portion of Testimony of Dr. John Edland, Medical Examiner.

(673) Q. Now, your findings, I take it, would be consistent, would they not, with an individual being struck by a truck doing 50 miles an hour; is that correct? A. I can't be specific about speed, but it certainly consist of a pedestrian being struck by the vehicle.

Q. Do you mean at any speed? A. A reasonable speed; 10, 15, 20, 50. He has a lot of injuries.

Q. Right. (674) A. I couldn't tell from the injuries what the speed was.

Q. You couldn't. Not even from the tremendous amount of injuries suffered? A. No.

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Excerpt from State Criminal Trial—Portion of Testimony of Deputy Sheriff Edward Blodgett.

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(694) [Assistant District Attorney Cornelius]:

Q. All right. Approximately. Now, did you have an opportunity to inspect the area north of pole 215?
[Edward Blodgett]:

A. No, sir.

Q. And where did you find the boots? A. South of pole 216.

Q. South of pole 216. I'm not clear, Deputy, and I'm sorry. If I were driving up East River Road in a northerly direction and after I passed Bailey Road, would I come first to pole 216 or 215? A. I believe 216, sir.

Q. And then driving further north in a northerly direction I then would come to pole 215; is that correct? A. Yes, sir.

Q. And again where did you find the boots? Before you came to pole 216? A. Yes, sir. I found them south of pole 216.

Q. And that would be closest to Bailey Road? A. Yes, sir.

Q. Now, in the area of where you found the boots, did you get an opportunity to look around that particular area (695) as to contour, et cetera, et cetera? A. Yes, sir.

Q. Can you describe that area to us? A. Well, the area is a field; there is a slight dip down and out into the field; there is a little stump up at the top.

Q. Well, in relation—is there any store or gasoline station in and about pole 216? A. No, sir. As I recall there is a vacant field across there to the north there is a store, but I don't know if there is a gas station near there.

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Excerpt from State Criminal Trial—Portion of Testimony of Thomas Lauricella, Stenographer, as to Kibbe and Krall's Statements to the Police.

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(838) [Assistant District Attorney Cornelius]:

Q. Question by Detective Ceretto: "You told him to get out then without his shoes and pants?" Answer by Mr. Kibbe: "I forgot to tell him to put the boots back on and I set them there and he then put the coat back on." [Thomas Lauricella]: A. That's correct.

Q. Question by Detective Ceretto: "Then you took off and left him there?" Answer by Mr. Kibbe: "Yes." A. That's correct.

Q. Question by Sheriff Skinner: "The man was down on the ground when you left?" Answer by Mr. Kibbe: "There was a gas station not far away. I told him to get to the (839) gas station so he wouldn't freeze to death because it was cold." A. That's correct.

Q. Question by Sheriff Skinner: "Why did you tell him?" Answer by Mr. Kibbe: "So he wouldn't freeze to death." A. That's correct.

Q. Question by Sheriff Skinner: "Why didn't you take him?" Answer by Mr. Kibbe: "Because I didn't want to get nailed for anything." A. That's correct.

Q. Question by Sheriff Skinner: "You didn't want to get nailed with the money?" Answer by Mr. Kibbe: "That's right." A. That's correct.

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(844) Q. "So he was pretty intoxicated or drunk?" Answer by Mr. Krall: "Yes." A. That's correct.

Q. "Whereabouts or what road did you leave him off of?" Answer by Mr. Krall: "East River Road." A. That's correct.

Q. "What portion of East River Road?" Answer by Mr. Krall: "What did he say the name was Meadowview. I don't know the names of the streets there."

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(845) A. That's correct.

Q. "When you dropped him off which part of the road did you drop him off of?" Answer by Mr. Krall: "On the right hand side." A. That's correct.

Q. "That would be the passenger side of the car?" Answer by Mr. Krall: "Yes." A. That's correct.

Q. "Where did you stop the car?" Answer by Mr. Krall: "On the side of the road." A. That's correct.

Q. "What was the—were there any cars there at that time?" Answer by Mr. Krall: "Yes, there was cars coming from behind us." A. That's correct.

Q. "What about the other direction?" Answer by Mr. Krall: "They were going both ways there weren't so many." A. That's correct.

Q. "And you dropped this man off or you helped him off on the side of the road, is that correct?" Answer by Mr. Krall: "Yes." A. That's correct.

Q. "Did he have any clothes on when he got out?" Answer by (846) Mr. Krall: "Yes." A. That's correct.

Q. "What?" Answer by Mr. Krall: "That I couldn't tell you but I know he had clothes on, it was dark, you couldn't see if he wouldn't have his clothes you have seen the blur." A. That's correct.

Q. "There was no traffic signals or street lights or anything like that at that location, is there?" Answer by Mr. Krall: "Just a store which is about 75 feet from where we left him."

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(852) Q. Question by Detective Ceretto: "He lowered his trousers?" Answer by Mr. Kibbe: "Yes, everything." A. That's correct.

Q. Question by Detective Ceretto: "Then you let him get out of the car with his trousers down?" Answer by Mr. Kibbe: "No, he had them up." A. That's correct.

Q. Question by Detective Ceretto: "How about his boots?" Answer by Mr. Kibbe: "He forgot them and I said sat them on the side of the road." A. That's correct.

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Excerpt from State Criminal Trial—Portion of Testimony of Thomas Lauricella, Stenographer, as to Kibbe and Krall's Statements to the Police.

(854) Q. Question by myself: "Did you see any traffic?" Answer by Mr. Kibbe: "There was no traffic, no. There was no traffic at all." A. That's correct.

Q. Question by myself: "Were there any street lights at all?" Answer by Mr. Kibbe: "In the distance." A. That's correct.

Q. Question by myself: "How long were you stopped?" Answer by Mr. Kibbe: "No." A. That's correct.

Q. Question by myself: "Pretty dark there?" Answer by Mr. Kibbe: "Yes." A. That's correct.

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Excerpt from State Criminal Trial—Portion of Testimony of Co-defendant Krall.

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(1018) [Attorney Beer]:

Q. What happened then? Let us say, what happened after you got to East River Road?

[Roy Krall]:

A. Well, we came up East River Road quite a little ways and the man apparently seen some lights of a store.

Mr. Cornelius: I object to that.

The Court: Sustained. "Apparently seen some lights," is stricken out and the jury is instructed to disregard it.

Q. What was said, if anything? A. He just said he wanted to get off there.

Q. Whereabouts was this? A. At a grocery store or delicatessen or superette or whatever it was.

(1019) Q. Is that where you stopped the car? A. Yes.

Q. How far would that have been from the store? A. About 75 feet.

Q. Did you see any gas station around there? A. No, I didn't.

Q. Was this on the same side of the street as the store or across the street? A. Across the street.

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(105) [Assistant District Attorney Cornelius]:

Q. And I think that you testified just a minute ago that you heard Barry ask for money. Now, what is the next thing you remember after that?

[Roy Krall]:

A. The man said he wanted to get out.

Q. When did that happen? (106) A. When we came to that store on the corner of East River Road and I think it's River Meadow Drive.

Excerpt from State Criminal Trial—Portion of Testimony of Co-defendant Krall.

Q. Is that, by the way, is that where the Sunoco station is? A. I think it's right near there.

Q. And so it's your testimony that it was at that intersection that the man asked to get out? A. That's right.

Q. And as you are heading in a norhbound direction the Sunoco station would be on your left; isn't that correct? A. I believe so.

Q. And the same with the store; isn't that correct? A. Yes.

Q. And both of these, both the gas station or the store or the superette would be north of the intersection? A. Which intersection?

Q. The intersection of River Meadow and East River Road? A. No.

Q. Is it on the south side? A. The store is on the north side and the station is on the south.

Q. All right. Whereabouts in relation then to the gas station and the store do you say that the man asked to get out? (106) A. Just about directly across from East River Meadow Drive.

Q. You mean, in the middle of the intersection? A. No, off to the side of the road.

Q. Was it before you got to the intersection or after? A. Just before we got to the intersection.

Q. So then, would it be your testimony that this would be opposite—

The Court: Just a minute please.

(Whereupon a discussion was had out of the hearing of the Court Reporter.)

The Court: You may continue.

Q. I believe you just testified, Mr. Krall that there came a time when the man asked to get out and he actually existed just prior to the intersection of River Meadow

Excerpt from State Criminal Trial—Portion of Testimony of Co-defendant Krall.

to East River Road. Did he get out on the right-hand side of the road? A. Yes.

Q. Can you describe the area where he got out? In other words, were there houses there or was there a field there? What exactly was on the side of the road? A. On the right side?

Q. Yes. A. I think it was an open field.

(1062) Q. Do you recall whether or not the gas station was open? A. No, I don't.

Q. Do you recall whether the store was open? A. Yes.

Q. And in fact the man asked to be left at the store; is that correct? A. Yes.

Q. And this would mean that he would have to walk across the road to get to the store? A. Yes.

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(1085) [Attorney Crimi]: Q. Well, do you recall being asked concerning where you had dropped off Mr. Stafford? [Roy Krali] A. Yes.

Q. And do you recall being asked what portion of East River Road? A. Yes.

Q. And do you recall exactly how you answered that question? A. I believe so.

Q. How did you answer? A. I believe I said on the right-hand side of the street.

Q. All right. Well, did you at that time say in response to the question: "What portion of East River Road?" And your answer: "What did he say the name was? Meadow (1086) View." Do you recall that? A. Yes.

Q. Now, what did you mean by "He say?" A. I had asked one of the detectives just before that what the name of that road was.

Q. And when had you asked the detective? A. Just before the question was asked me.

Q. Now, I show you page 19 of Exhibit 25 and you see

Excerpt from State Criminal Trial—Portion of Testimony of Co-defendant Krall.

that question and answer on there. "In other words, what portion of East River Road?" Answer: "What did he say the name was? Meadow View? I don't know the names of the streets there." Is that correct? A. Yes.

Q. And you say that when you said "He" you were referring to a detective? A. Yes.

Q. And that this detective told you the name of the street, Meadow View? A. Yes.

Q. And there was a discussion about it before this question was asked? A. Yes.

Q. Now, looking at this page, do you see any record there (1087) of the discussion between you and a detective relative to Meadow View? A. No.

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Excerpt from State Criminal Trial—Portion of Summation by Kibbe's Attorney.

(1094) [Mr. Crimi, Kibbe's Attorney]:

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. . . I would appreciate if you will give me your permission and indulgence to review the evidence in this case and the inference that can be drawn from it. Let's look at this indictment. Count 1 says and I will read the important part. That the defendant, "Feloneously and under circumstances evincing a depraved indifference to human life recklessly engaged in conduct which created a grave risk of death to another person, to wit, George Stafford and thereby caused the death of George Stafford." So, you can see by the accent that I put on reaching that, the elements of this particular crime, and which must be proven beyond a reasonable doubt.

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(1107) And then on top of all this, now you have heard all the evidence, ladies and gentlemen of the jury, you have listened to it very attentively, you are going to have to honestly come to the conclusion that here is three people, all three drinking, and that (1108) these two, or at least my client were in a position to perceive this grave risk, be aware of it and disregard it. Perceive that Mr. Stafford would sit in the middle of the northbound lane, that a motorist would come by who was distracted by flashing lights in the opposite lane, who then froze at the wheel, who then didn't swerve, didn't brake, and who was violating the law by speeding, and to make matters worse, he had at that particular time, because of what the situation was, he had low beams on, that is a lot of anticipation. That is a lot of looking forward. Are you supposed to anticipate that somebody is going to break the law when you move or do something? I think that is a reasonable doubt.

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Excerpt from State Criminal Trial—Portion of Summation by Co-defendant Krall's Attorney.

(1115) [Mr. Beer Co-defendant Krall's Attorney]:

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And I appreciate it because it's been a long case, and I just ask you to bear with us a litte longer until we finish our summations and you have heard the Court's charge on the law before you come to any conclusions or opinions in this matter.

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Now, Mr. Crimi of course has covered some points in the case which are common to the whole case, and which apply to the whole case in his summations on behalf of his client the Defendant Kibbe. You have heard the Court's preliminary remarks on the rules of law which will apply and which he will instruct you on in more detail and more carefully in his charge.

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(1116) You probably have the counts well in mind since we have all gone over it. The first count of this indictment charges the defendant Roy Krall whom I represent with the crime of murder. Now, the Court will instruct you in more detail as to the law in this count. The accusation, as you also know that this whole indictment is but an accusation. It's easy to accuse. The question is, is there proof of the accusation? A person can be accused of anything that comes to mind. The first count of the (1117) indictment accuses the Defendant Roy Krall of murder in that he evinced a depraved indifference to human life. And he recklessly engaged in conduct which created a grave risk of death to another person, to wit, George Stafford and thereby caused the death of George Stafford. Now, there is the accusation. It's not evidence, but each word of that accusation has to be borne in mind by you and weighed carefully and you have got to see whether

Excerpt from State Criminal Trial—Portion of Summation by Co-defendant Krall's Attorney.

each word of that accusation has been borne out by proof as against the Defendant Roy Krall. I don't think you will find there is any proof, to say nothing of proof of guilt beyond a reasonable doubt, that the Defendant Roy Krall showed any depraved indifference to human life on the night of December 30th, 1970. The proof shows that if there was any depraved indifference to human life, any depraved conduct, it was on the part of that motorist who caused the death of George Stafford and of which nothing was apparently made as far (1118) as we know of that kind of conduct. And he testified on the witness stand that his speed was that of 50 miles an hour. That he saw the man in the road when he was 100 to 200 feet away. That he made no effort to avoid the accident by applying his brakes or by swerving his wheels. There you have the cause of death, ladies and gentlemen, there you have, if any, if there was any depraved indifference to human life, you have it right there and not on the head of Roy Krall.

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(1125) But evidently, that's the choice the prosecution has made in trying to show that this man was so intoxicated that the fact of his intoxication, the reason from that, and I ask you the reason, that he should not have been left out of the car at the side of the road and to ask you to reason further from that, that because he was let out of the car at the side of the road, that the Defendant Krall was bound to anticipate that he would be struck by a car, struck and killed by a car; that's what they're asking you to convict the defendant or murder based on that kind of evidence. The testimony is uncontradicted that he was left out near a place where people were, where there was a gas station and a store across the street from it. That they had every reason to suppose that he would make his way over there.

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Excerpt from State Criminal Trial—Portion of Summation by Co-defendant Krall's Attorney.

(1129) But I feel that after you have carefully reviewed all the evidence to which you have already carefully listened and taken the instructions on the law from the Court as to the law that applies to these facts as you will find them to be, you will find that the proof has fallen far, far short of convicting the Defendant Roy Krall of any of these crimes as I have outlined them to you here for the reasons which I have stated and that each one of you will have (1130) no hesitation about to sticking to a verdict an opinion of not guilty on behalf of Roy Krall.

Thank you.

Excerpt from State Criminal Trial—Portion of Summation by the People.

(1130) The Court: Proceed.

Mr. Cornelius [Assistant District Attorney]: Judge Ogden, Mr. Crimi, Mr. Beer, members of the jury, my colleagues have made reference to the indictment which charges these two defendants with certain crimes and because the indictment although it (1131) is no proof of any of the facts, alleged therein or because the indictment is the charge and is really ultimately the charges or contains the charges upon which you will ultimately deliberate, I shall likewise refer to it.

The indictment contains four counts. The first count is the charge of murder; the second count is the crime of robbery in the first degree and the third crime is the count of robbery in the second degree and the fourth count is the crime of grand larceny in the third degree. Rather than go through each one of these counts separately and primarily because Mr. Beer and Mr. Crimi I think spent a good deal amount of time during their summations, their respective summations, discussing count No. 1, with your permission I would like to also do the same, because I think that much of what I have to say with respect to the first count of the indictment would apply and would encompass anything that I could say about count 2, count 3 or count 4, (1132) because basically, it's the same fact situation we are talking about.

The first count of the indictment, as we have mentioned and has been read to you on the voir dire and it has been mentioned to you in the summations of defense counsel, charges the defendants with the crime of murder, feloniously and under circumstances evincing a depraved indifference to human life. Just think about that for a minute. Circumstances evincing a depraved indifference to human life in that they recklessly engaged in conduct which created a grave risk of death to another person and

thereby caused the death of that other person. As I mentioned on my opening, the word recklessly has a legal definition and Judge Ogden will probably charge you the legal definition of recklessly. When I said to you that the People will sustain their burden of proof and prove that these defendants not only acted under circumstances evincing a depraved indifference to human life but also acted (1133) recklessly in causing the death of Mr. Stafford, I said to you that by that term I meant that we would prove that these two defendants were aware of and consciously disregarded a substantial and unjustifiable risk that death would result. I listened from about 11:30 on until about 12:30 this morning, or this afternoon, I should say, to my colleagues who, and I think I must have heard it at least a dozen times, Mr. Cornelius wants you to believe this and and Mr. Cornelius wants you to believe that and Mr. Cornelius wants you to believe this. Members of the jury, the only thing that I ask from you as an attorney representing the People of this State is that in judging the facts as you find the facts to be that you bring to bear a good common sense, your good judgment that you have acquired in your respective lives and birng it to bear and apply it to the facts of this case as you have heard it and then ask yourselves, has a crime been proven with respect to each one of these (1134) counts; with respect to the first count of the indictment ask yourself, based upon the facts that have been proven here as a person of good common sense, based upon the law that Judge Ogden will give you, did the circumstances here and the acts of these defendants evince a depraved indifference to human life? And did they act recklessly and caused the death of Mr. Stafford? With your permission, I would like to, as I say, that is the only thing I'm going to ask you, but with your permission I would like to go through which I think one of the defense counsels did, 1, 2, 3 and 4 and list some of

the facts in this particular case, and in each instance, and with respect to each fact and as you add the facts together ask yourselves: Has this evinced a depraved indifference to human life? Does this constitute recklessly within the meaning of the law?

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(1152) Well, I think it was Mr. Crimi who said, he said, how can you expect these two men to have anticipated that this man would get out in the middle of the road, sitting down in the road and getting struck by a car? I think it was Mr. Krall who was asked: "Where did you stop the car?" And he answered: "On the side of the road." Question: "Were there any cars there at that time?" And he answered: "Yes, there were cars coming from behind us." Well, if you accepted my theory or my argument up to now, you now have a man, a very intoxicated man and the defendants know he is very intoxicated, he's been robbed, he not only has no money, he has no identification, nothing on his person. You have him without (1153) his boots, with his pants around his ankles, let out on the side of the road, in a dark area with an open field to the east of him which means if he was helped or if he is trying to get help or if he is going to walk to a gas station or to walk to a store, the only way is up the road or across the road and it's 4 degrees out, and these defendants know that there are other cars on that road. Does this evince a depraved condition to human life? Well, members of the jury, if there are any questions about whether these acts constitute and evince a depraved condition to human life, if there is any doubt that these acts amount to reckless conduct—there is one other fact that I haven't mentioned yet, because you take an intoxicated man, Mr. Stafford's condition, with his pants around his ankles and unfortunately, I can't agree with Mr. Crimi, I don't know how many of you have children, somehow their diapers come off or their pants come

trousers are down who is intoxicated and it's cold—it's down and you can see them try to walk, but a man whose trousers are (1154) down who is intoxicated and it's cold—it's freezing, and he doesn't have his boots on, and he can't see because they have taken his glasses. Again, I refer to the testimony of Mrs. Mammano who knew this man, who lived with this man. She wasn't married to him. She lived with him. She knew him like a wife would know her husband. The first thing that this man did every morning was put on his glasses. He couldn't see without his glasses. You can examine them. You can look at the strength of them.

So, I submit, members of the jury, the circumstances here are little more than Mr. Beer or Mr. Crimi would have you believe, because you have a man, and I will repeat it for the last time, you are probably getting tired of hearing it, a man who was drunk, a man who had been robbed, a man who had his trousers around his ankles, a man who had his boots taken off, a man who was out there in 4 degree weather with an open field and a man who can't see, what is he gonna do? (1155) What is he gonna do? He's probably going to do the same thing that he did. He certainly isn't going to walk eastward across the snow across the field. So, he went into the road and along comes a truck and that's the end of Mr. Stafford.

These acts constitute and evince a depraved condition to human life. I will leave that up to you. You now become the judges of that.

There is one other aspect that I'd like to talk about on this first count, and also actually in regard to the second count. As I mentioned not only does the first count contain reference to and require proof of a depraved indifference to a human life, it proves that the defendant recklessly engaged in conduct which created a risk of death in that they caused the death of George Stafford. Now, I

Excerpt from State Criminal Trial—Portion of Summation by the People.

very well know, members of the jury, you know, that quite obviously the acts of both of these defendants were not the only (1156) the direct or the most preceding cause of his death. If I walked with one of you downtown, you know, and we went across one of the bridges and you couldn't swim and I pushed you over and you drowned because you can't swim, I suppose you can say, well, you drowned because you couldn't swim. But of course, the fact is that I pushed you over. The same thing here. Sure, the death, the most immediate, the most preceding, the most direct cause of Mr. Stafford's death was the motor vehicle, the truck driven by Mr. Blake that hit him right square, the middle of the grill, I think he said, that Mr. Stafford was seated or I forget how he described him, he's not standing up, or at least he's on his knees or he is sitting down with his hands up in the middle of the northbound lane. Sure, that's the most direct cause of death. But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the (1157) acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there. His glasses were taken and his identification was taken and his pants were around his ankles.

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Excerpt from State Criminal Trial—Charge to the Jury.

(1162) The Court: Members of the jury, a grand jury of the County of Monroe has indicted these two defendants by an indictment reading as follows: "The People of the State of New York against Roy A. Krall and Barry Warren Kibbe. First count: The grand jury of the County of Monroe by this indictment accuse the defendants Roy A. Krall and Barry Warren Kibbe of the crime of murder in violation of Sections 20.00 and 125.5, sub. 2 of the Penal Law of the State of New York (1163), committed as follows: The defendants on or about December 30th, 1970 in the County of Monroe, State of New York, feloniously and under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to another person, to wit, George Stafford, and thereby caused death. Second count: The grand jury of the County of Monroe by this indictment accuse the defendants of the crime of robbery in the first degree in violation of Section 20.00 and 160.15, sub. 1 of the Penal Law of the State of New York committed as follows: The defendants at the same time and place set forth in the first count of the indictment feloniously and forceably stole property, to wit, a sum of United States currency and other personal property from George Stafford, and when in the course of the commission of the crime or the immediate flight therefrom, the defendants seriously endangered George Stafford who was not a participant in the (1164) crime. Third count: The grand jury of the County of Monroe by this indictment further accuse the defendants of the crime of robbery in the second degree in violation of Sections 20.00 and 160.10 sub. 1 of the Penal Law of the State of New York committed as follows: The defendants at the same time and place set forth in the first count of this indictment feloniously and forceably stole property, to wit, a sum of United

States currency and other personal property from George Stafford, and when each defendant was being aided by another person, to wit, the other defendant who was actually present. Fourth count: And the grand jury of the County of Monroe by this indictment further accuse the defendants of the crime of grand larceny in the third degree in violation of Section 20.00 and 150.30, sub. 5 of the Penal Law of the State of New York committed as follows: The defendants at the same time and place set forth in the first count of this indictment feloniously stole property, to wit, a (1165) sum of United States currency and other personal property from the person of George Stafford."

The indictment is no proof or evidence whatever of the guilt of these defendants or either of them of the crime or crimes charged. It must not be used by you as any proof of their guilt whatever. Your verdict, whether it be guilty or not guilty is dependent and must follow only the evidence produced here in this courtroom by the witnesses who have appeared before you. When I refer to evidence, I mean oral as well as written exhibits received in evidence are included as a part of the evidence.

This indictment is rather an accusation of wrongdoing on the part of a named person. That accusation is made by a body of the citizens of the County of Monroe and is no proof whatever of the guilt of these defendants or either of them of the crime or crimes charged.

In that connection, members of the jury, (1166) I point out to you, and I ask you to consider the evidence in this light, any statement made, if you find it was a true statement in accordance with the rules of law which I will afterwards give to you, and a voluntary statement can be used as evidence only, and I repeat, only, against the person making that statement and not against the co-defendant or any other person. If A says B did this, that or

the other thing in A's statement, that statement and whatever its contents are cannot in any fashion be used against B. It's only what A says that he did that you may consider and then only as against A. In other words, whatever is contained in a statement of either of these defendants if believed and if given freely and voluntarily can be used as evidence only against the person the defendant making the statement and not against his co-defendant.

Before I get further into the charge I think it proper to compliment all of the attorneys upon not only the way in which (1167) they have handled the introduction of evidence, examination and cross-examination and in their summaries, the arguments they have made to you why you should find or believe a certain way, but in their conduct of the case. I believe, and it is my opinion that that conduct of all these attorneys, all three of them has been not only gentlemanly, it has been thorough and in every way they have protected zealously the rights of their respective clients.

These defendants appear before you presumed to be innocent. They do not have to offer any evidence tending to prove or disprove their innocence. They don't have to do anything. They are presumed to be innocent and that presumption of innocence surrounds and protects them throughout the trial and until you, by your verdict, if such be your verdict, have found one of them or either of them otherwise. The burden of proving the defendants or each of them guilty of each or any of the crimes (1168) charged beyond a reasonable doubt is always upon the People of the State of New York represented by the District Attorney. The People must prove each defendant guilty beyond a reasonable doubt before you, by your verdict, can find him guilty.

Excerpt from State Criminal Trial—
Charge to the Jury.

In this case, each of the two defendants is accused of four separate crimes. In your deliberations and the verdict that you will return, separate the defendants and consider each one as a separate case and as to each defendant consider whether he is guilty or not guilty of each of the charges for which he has been indicted. That is, each defendant will be found guilty or not guilty of each of the four accused crimes.

A reasonable doubt is not a mere whim nor a mere guess nor a mere surmise nor is it a subterfuge to which resort may be had by a juror to avoid doing an unpleasant and disagreeable duty. The words beyond a reasonable doubt do not mean that the (1169) People, the prosecution, must establish the guilt of the defendant to an absolute certainty or to a mathematical certainty or beyond per adventure or beyond every imaginable, every conceivable, every possible doubt. A reasonable doubt is an actual doubt of which you are conscious after going over in your minds the entire case giving consideration to all of the testimony and every part of it. If you then feel uncertain that the defendant is guilty and such uncertainty is reasonable and you feel that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as that of which you are conscious, that is a reasonable doubt and the defendant is entitled to the benefit of it. A reasonable doubt is such a doubt as a reasonable man may entertain after a careful and honest review and consideration of the evidence. It must be founded on reason and must survive the test of reasoning or the mental process of (1170) a reasonable examination.

If all the reasonable evidence in this case does not convince you as to the guilt of each of the defendants of the crime or crimes charged and if, at the end of your deliberations, there is still left in your minds a lack of certainty, a

Excerpt from State Criminal Trial—
Charge to the Jury.

doubt based upon the evidence or lack of evidence in this case for which doubt you could give a sound reason if called upon to do so as to the guilt of the defendant of the crime charged, then, and in that event you should give to the defendant the benefit of that reasonable doubt and therefore find him not guilty.

Credible testimony is simply that testimony which you find to be true, believable which has the ring of sincerity, probability about it. It is the kind of testimony which would cause you to take action in a matter of like importance effecting yourselves. From all of the testimony received here use your own good judgment and determine what you believe; that is credible (1171) testimony.

Dr. Edland was called as a witness to testify as to the death and the cause of death of George Stafford. He is what we classify as an expert witness. His testimony is that of an expert and is received from him, who by reason of training, experience and study, has been shown qualified to express an opinion on subject which we laymen are not usually familiar. Such testimony, except whereas to a present or past fact is opinion testimony. And considering opinion testimony and the weight to be given to it, consider the qualifications such as study, training, and experience of the witness expressing the opinion in his opportunity for observation and a similation of the facts upon which his opinion is based.

You are the sole judges of the facts. In reaching your conclusions as to what facts have been proven beyond a reasonable doubt you will use your own recollection, not that of either counsel or of myself.

(1172) I call to your attention that if you can not remember what the testimony was or if there is any kind of a dispute about what the testimony was you are at liberty to ask the Reporter to read that testimony to you.

You are also the sole judges of the credibility of the

witnesses. In reaching a conclusion as to what weight you will give to the testimony of any witness you may take into consideration his demeanor, his manner of testifying, his relationship to the case or the parties, the motive, if any, the witness may have for testifying truthfully or falsely and the probability of the story told by the witness. You may call to your aid the knowledge you have acquired in your every day life in sizing up people and in deciding whether or not they are telling the truth. If you find that any witness has wilfully testified falsely as to any material fact, you may disregard the entire testimony of that witness. You (1173) may, if you wish, give credence to so much of his testimony as you find corroborated or substantiated by other credible testimony.

During the course of the trial it was necessary that I make some rulings upon objections or upon the admission or exclusion or striking of testimony from the record. Disregard those rulings in their entirety. Do not use them to the prejudice of any party to this lawsuit. You will follow, however, the rulings whereby certain testimony was stricken from the record and you are instructed to disregard it. Follow those rulings consciously.

The arguments of counsel are advanced for your help in reaching a fair and just verdict. Where the arguments are based upon any evidence received in this lawsuit, not necessarily evidence that you find to be credible or upon inference reasonable to be drawn from that evidence, those arguments you may follow. If the arguments are not based upon any testimony received in this (1174) lawsuit or upon inference reasonable to be drawn from that testimony, disregard them in their entirety.

If, in the course of your deliberations, the question of punishment or possible punishment attended upon a verdict of guilty should arise, I charge you, members of the jury, punishment or possible punishment is no part and

must be no part of your deliberations. That follows logically. You are to decide what the true facts are. You are to apply to them the law which the Court has given to you and upon both the facts and that law decide whether the People have met their burden of proof. Decied whether the defendant, each of the defendants is guilty or not guilty of each of the crimes charged. If, and only if your verdict against either defendant on any charge be one of guilty, then the Court and the Court alone has the duty and responsibility of imposing punishment. So, punishment is no part of and can be no part of your deliberations.

(1175) These crimes or the crimes charged all require an intent on the part of the perpetrator to consummate the respective crimes. Intent is a frame of mind of a defendant at the time he commits the act. Murder. Robbery. Larceny. You may wonder how you are to determine what a man's intent is? You can only determine that by his acts and conduct; by what he does and by what he says. Sometimes, as you are well aware, acts speak louder than words. Ordinarily, a person intends the natural consequences of his act. It is for you to determine the defendants' intent, if any, from all of the evidence in this case. In that connection, you may consider what each defendant did; what means he employed; the surrounding circumstances; the condition of the people involved; the time of day or night; his manner of clothing and anything of that nature received here in evidence surrounding the transactions set forth during the course of this trial. That intent is an essential element of the crimes of which (1176) each of these defendants is charged.

Some of the facts, and I'm not going to detail them, they have been adequately and fully covered by counsel in their summations, and by the evidence itself, but circumstantial evidence has been offered to prove some of the facts.

Excerpt from State Criminal Trial—
Charge to the Jury.

Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. Circumstantial evidence is the proof of collateral facts and differs from direct and positive proofs in that it never proves directly the fact in questioin. In other words, direct or positive evidence as the term is commonly used, means statements by witnesses, directly probative of one or more of the principals or res gestae facts of the case while circumstantial evidence puts before you facts which alone or with others are in some degree, but indirectly probative of one or more of those principles or res gestae facts and from which one or more of those principle facts (1177) may properly be inferred. Circumstantial evidence means proof by circumstances surrounding the transaction. In a given case there is furnished direct proof of certain facts and circumstances from which you may infer other connected facts which usually and reasonably follow according to the common experience of mankind. The inference may not be based upon conjecture, supposition, suggestion, speculation or upon another inference. The facts from which the inference are to be drawn must be established by direct proof. If you can infer from the proven facts a conclusion that is as consistent with innocence as with guilt, such evidence may not be used as proof of guilt or, by its very nature, it does not meet the requirement of proof of guilt beyond a reasonable doubt. When there are two inferences which can be drawn from circumstantial evidence, one leading logically to the conclusion of guilt, and the other leading logically to the conclusion of (1178) innocence, then the circumstantial evidence has no weight or value and it is your duty to ignore it. In determining whether a fact has been proven by circumstantial evidence there are two general rules to be observed. One, the hypothesis or inference of delinquency or guilt should

Excerpt from State Criminal Trial—
Charge to the Jury.

flow naturally from the facts proved and be consistent with them all. Two, the evidence must be such as to exclude a moral certainty every hypothesis or inference but that of the guilt of the defendant of the offense imputed to him. Or, in other words, the facts proved must all be consistent with and point not only to his guilt but they must be inconsistent with his innocence.

Section 60.45 of the Criminal Procedure Law reads as follows: "Evidence of a written or oral confession, admission or other statement made by a defendant with respect to his participation or lack of participation in the offense charged may not be received in evidence against him in a criminal pro- (1179) ceeding if such statement was involuntarily made. A confession, admission or other statement is involuntarily made by a defendant when it is obtained from him, (a) By any person, by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of underlying his ability to make a choice whether or not to make a statement or (b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him; (1) By means of any promise or statement of fact which promise or statement creates a substantial risk that the defendant might falsely incriminate himself or (2) In violation of such rights as the defendant may derive from the constitution of the state or of the United States."

Section 60.50 of the same law reads as (1180) follows: "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed."

In this case, members of the jury, if you find that the

statement, admission or confession of the defendant was voluntarily made, was a free expression of his will in accordance with the rules which I'm about to give to you, you must also, before you can convict that defendant of any of these crimes, find some additional evidence that the offense charged has been committed. Now, in this case, as far as the robbery is concerned, just to point to one piece of the evidence that has been offered, one of these defendants showed a hundred dollar bill in a bar after the alleged offense. That may be some evidence that the offense occurred and that the hundred dollar bill was taken from the victim of the robbery. I just use that by way of illustration of what I mean by (1181) some additional evidence that the offense charged has been committed. Naturally, there are other bits, pieces of evidence, and I do not pretend to detail them all. When I say there are, there have been received in evidence additional facts from which you may find that the offense charged has been committed.

In addition to the confession or the statement or the admission, there is proof of circumstances which although they may have an innocent construction are nevertheless calculated to suggest a commission of crime, and for the explanation of which the confession furnishes a key, the statute is complied with. It is not necessarily that such additional evidence should be sufficient to convict a defendant independent of the confession or statement. The question is whether there is any evidence in addition to the confession or statement reasonably tending to prove the crime and thus corroborate the confession.

(1182) Now, referring to the confession or statement or admission by whatever name it's called itself, I charge you as follows: If you determine that it was a confession, the statement or admission offered here, and this refers to each of the statements, and if you determine that the defendant made it, that is, the respective defendant made

the statement attributed to him, and if you determine that it is true, if you determine that it is accurate, before you may use it you must find that it is voluntary and the prosecution has the burden of proving that it was a voluntary confession. The defendant merely comes forward with the suggestion that it was involuntary or he may not offer any proof at all, that is his privilege. But the burden is upon the prosecution to show that it was voluntary. A confession, even if true and accurate, if involuntary may not be used. If you say it was involuntarily obtained it goes out of the case. If you find it was voluntarily made, the weight of it is (1183) for you to determine. I am submitting to you as a question of fact to determine whether or not (a) This statement was made by the defendant, the respective defendant. (b) Whether it was a voluntary statement or a confession. And (c) Whether if voluntary, it was true and accurate. That decision is yours. Should you decide that it is voluntary, true, and accurate, you may use it and give it the weight you feel that you should give it. If you should decide that it is involuntary, exclude it from the case and do not consider it at all. In that event, you must go to the other evidence in the case to see whether or not the guilt of the defendant, and I refer to each of the defendants, was established to your satisfaction outside of the confession or the admission beyond a reasonable doubt. If you should determine from the evidence that the defendant made this confession or statement, the confession or statement attributed to him, and that it was a true confession, then if you also decide (1184) that it was gotten by influence or fear produced by threats or that it was coerced in any fashion, mentally or physically, reject it. I repeat to you: The burden of proving beyond a reasonable doubt the accuracy, truth and the voluntariness of the confession always rests upon the prosecution.

There has been some reference to intoxication, and I charge you, members of the jury, intoxication is the state or condition which inevitably follows from taking excessive quantities of an intoxicant. Intoxication implies undue or abnormal exitation of the passions, or feelings or the impairment of the capacity to think and act correctly and efficiently. It suggests the loss of the normal control of one's feelings. The intoxication need not be to the extent of depriving the accused of all power of volition or of all inability to form an intent.

I think from the evidence that you may find it proper to consider intoxication both as to each of these defendants. Each of whom (1185) in the statement, if you find that can be used in evidence, said that he had been drinking quite a while before the three of them, Stafford, Krall and Kibbe left Nick and Corky's bar. And also, in connection with the Defendant Krall's testimony that he had 10 or 12 drinks of intoxicants the day that he is alleged to have made a statement to the Sheriff's representatives. I think it is proper for you to also consider the question of intoxication in connection with the condition of the deceased George Stafford only as one of the factors, mind you.

There is also another rule of law that the exclusive possession of the fruits of a crime, if unexplained or falsely explained justifies the inference of guilt. This rule is applicable to all kinds. In that connection, I call to your attention the testimony that one of these defendants, after the alleged crime exhibited or displayed a one hundred dollar bill in a bar. I believe there was some testimony in the statement of the (1186) other that he had produced—was there or was there not?

Mr. Cornelius: Yes.

The Court: That he produced a one hundred dollar bill in the Sheriff's Office. They are relevant or that testimony may be relevant only because of the other testimony from

the witness Herbert Stern that the deceased George Stafford on the day in question, December 30th, 1970 had been at his law office and by way of a retainer had paid Mr. Stern two, one hundred dollar bills. That upon a change of mind Mr. Stern returned the same bills to Mr. Stafford, two, one hundred dollar bills. They were returned some time around noon or the early afternoon of the day in question.

I have already pointed out to you that if you find these alleged statements or confessions voluntary and true and accurate, if you see fit in accordance with a law which I have given to you to use them at all, they can only be used against the (1187) defendant making the particular statement. The statement of one defendant cannot be used against the other in any way whatever. It is no evidence against the co-defendant.

In connection with the crimes charged I define certain phrases or words to you as follows: Section 20.00, sub. 10 of the Penal Law defines serious physical injury as follows: "Serious physical injury means physical injury which creates a substantial risk of death or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

Recklessly has been defined in Section 15.00 of the same law as follows: "A person acts recklessly with respect to a result or to a circumstances described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. (1188) The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation, a person who creates such a risk that is unaware

thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

Section 15.25 of the same law reads as follows: "Intoxication is not as such a defense to a criminal charge but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged."

"Feloneously means unlawful, illegally with criminal intent."

"Knowingly means with knowledge, consciously, intelligently, wilfully, intentionally."

"Immediate means present, at once, without delay, not deferred by any in value of time." I give you that definition in (1189) connection with the phrase immediate flight. Consider whether the flight of this defendant or each of them was immediate.

"Depraved has been defined as to Exhibit contempt for." A depraved mind has been defined as "An inherent deficiency of moral sense and reptitude." It is also defined as a "Highest grade of malice."

"Grave is serious. The opposite of trivial or inconsequential."

Indifferent has been defined as, "Disinterested, without care or consideration for the consequences of the act."

In this case, members of the jury, before either of these defendants can be convicted of any of the crimes charged, all of the elements of that crime must be proven beyond a reasonable doubt.

Homicide is defined in Section 125.00 of the Penal Law as follows: "Homicide means, conduct which causes the death of a person under circumstances constitution murder, manslaughter first degree, or manslaughter (1190) in the second degree." Under the first count of this indictment each of these defendants is charged with murder. Section

125.25 of the Penal Law reads as follows "A person is guilty of murder when, (2) under circumstances evincing a depraved indifference to human life he recklessly engages in conduct which creates a grave risk of death to another person. And thereby causes the death of another person. I think I defined to you the different words used in that section.

The indifference to human life is the indifference to the life of George Stafford. And not to the life of the public in general. It's indifference to the human life of George Stafford. You will note that section requires proof of recklessly engaging in conduct, because the section refers to reckless acts on the part of the defendant and only for that reason, I charge you manslaughter in the second degree and manslaughter in the first degree. You will not consider either (1191) of these crimes unless you feel that these defendants or either of them, was guilty of causing the death of George Stafford recklessly. But, they do not come within the provision of 125.25, sub. 2.

Manslaughter in the first degree is defined in Section 125.20 as follows: "A person is guilty of manslaughter in the first degree when with intent to cause serious physical injury to another person—" Strike that, members of the jury. Do not consider the crime of manslaughter in the first degree at all. That is out of the case. Consider only the crime of manslaughter in the second degree which is defined as follows: "Section 125.15 of the Penal Law reads as follows: A person is guilty of manslaughter in the second degree when he recklessly causes the death of another person." You will note that there is quite a difference between the definition of murder which I have given to you and the definition of manslaughter in the second degree.

(1192) Robbery is defined in Section 160.00 of the same

law as follows: "Robbery is forceable stealing." A person forceably steals property and commits robbery when in the course of committing a larceny he uses or threatens the immediate use of physical force upon another person for the purpose of (1) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking. Or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Robbery in the first degree is defined in Section 160.15 of the same law as follows: "A person is guilty of robbery in the first degree when he forceably steals property and when in the course of the commission of the crime or of immediate flight therefrom he or another participant in the crime (1) causes serious physical injury to any person who is not a participant in the crime." In (1193) this case, George Stafford. In that connection, I charge you, members of the jury, that causing the death of a person causes serious physical injury to that person.

Robbery in the second degree is referred to in the third count of the indictment and is defined in Section 160.10 of the same law as follows: "A person is guilty of robbery in the second degree when he forceably steals property and when: (1) He is aided by another person actually present."

Larceny is defined in Section 155.05 of the same law as follows: "A person steals property and commits larceny when with intent to deprive another of property or to appropriate the same to himself or to a third person he wrongfully takes, obtains or withholds such property from an owner thereof."

Grand larceny in the third degree is defined in Section 155.30 as follows: "A person is guilty of larceny in the third degree when he steals property and when— (1194)

subdivision 5, "The property regardless of its nature and value is taken from the person of another."

Section 20 under which both of these, each of these defendants is indicted reads as follows: "Section 20.00. When one person enages in conduct which constitutes an offense, another person is criminally liable for such conduct when, and acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or inttntionally aids such person to engage in such conduct."

If any of these crimes were jointly planned between the two defendants and jointly carried out with the knowledge of each of the defendants of what the other was doing, each defendant is liable for the acts of the other in committing the crime charged.

You have listened patiently to the testimony in this case and I am certain that it is probably fresher in your minds than it is in mine. Briefly, all of these offenses, (1195) murder, robbery and larceny are alleged to have occurred about 10 or a little after 10 in the evening of December 30th, 1970 on East River Road somewhere in the vicinity of telephone poles numbered 215 and 216 and at a point at or near a place described as or referred to as being about a half mile from Bailey Road. You have heard the testimony of the different witnesses, the deputy sheriffs, the testimony as to the statements made by each defendant as to what he did and what he knew about the crime. You have heard the testimony as to all three of these men, the defendants and the third man, George Stafford, being present at the Nick and Corky's bar and leaving at or about the same time. You have heard the testimony of how Stafford wanted to get a ride to Canandaigua where he lived and that he finally prevailed upon, I think it was Kibbe, to use his car to transport him to Canadaigua. You have heard what transpired, the testimony as to what transpired. You

have heard the testi- (1196) mony to the effect that Krall drove the car after reaching or being in the vicinity of the Thruway, you have heard the testimony as to the direction of the driving. You have heard what occurred, the testimony as to what occurred at the time the car was stopped on East River Road. The testimony that the car was stopped near a gas station or a superette and other testimony that it was stopped some distance away in a vacant territory off the road. You have heard the testimony as to what occurred in the back seat of the car regarding the victim Stafford. You have heard the testimony regarding the different articles which have been testified to as being the property of George Stafford being found in the car. You have heard testimony as to how he exited, how George Stafford exited from the car or as to how he was caused to exit. What his condition of clothing was. What his condition of dress or undress. What the lighting conditions were. What the temperature being near zero was. The fact that (1197) there was hard snow on the ground and some testimony that wind was blowing, putting a crust on the snow. You have heard the testimony as to the death or running into of George Stafford in the East River Road by an automobile—truck or a light truck. You have heard testimony that he was dragged some distance under the truck or car that hit him. You have heard testimony as to how these different articles were obtained, how they were seen. You have heard testimony as to what each defendant said or denied doing regarding the whole incident. You have heard the testimony of Mr. Krall that he in no way, I think to the effect that he in no way knew that anything wrong was going on in the back seat of the car and that he had no intention to perform many illegal act as far as the deceased George Stafford was concerned.

In that connection, by their pleas, their respective pleas of not guilty, each defendant has denied any guilt whatever

(1198) of any of the crimes charged, and I repeat, each of these defendants appears before you presumed to be innocent.

Again, members of the jury, not by way of giving you an easy out or anything of the sort, I charge you, robbery in the third degree which you will consider only if you are unable to agree upon the counts of the indictment charging robbery in the first degree and robbery in the second degree and only if you feel that some robbery did in fact occur. Robbery in the third degree is defined in Section 160.05 of the Penal Law as follows: "A person is guilty of robbery in the third degree when he forceably steals property."

Take the case, members of the jury, first decide what the credible facts are and then apply to them the law which I have given to you. Use all of the evidence, every part of it in reaching your determination and decide on the evidence and on the law whether each of these defendants is (1199) guilty or not guilty of each of the crimes charged.

According to law, juror No. 5 is the Foreman of the jury, and he is appointed as Foreman. Among other things he will consider the arguments advanced and see that they are considered in proper and logical form and will also report to the Court the verdict you have agreed upon.

This being a criminal case it is necessary that all 12 of you jurors first chosen agree upon a verdict before that can be announced as the verdict of the jury.

You will base your verdict upon the evidence, all of the evidence, and decide the case in accordance with the law and the evidence and be sure that whatever verdict you return it is free from passion, prejudice, sympathy, or any other improper motive.

Are there any requests or exceptions?

Excerpt from State Criminal Trial—
Charge to the Jury.

Mr. Cornelius: The People have none, thank you, Your Honor.

(1200) Mr. Beer: I have just two exceptions, Your Honor. First, I respectfully except to the Court charging the jury that the Defendant Krall's producing of a one hundred dollar bill was additional evidence or possible additional evidence that the crime charged had been committed.

And my second exception is the Court charging the jury on the robbery first degree that the inflicting serious physical injury includes causing the death of a person.

The Court: Any requests or exceptions, Mr. Crimi?

Mr. Crimi: I first respectfully except, that the indifference to human life means the indifference to the human life of George Stafford. I also join in the exceptions as to the serious physical injury as stated by Mr. Beer.

Also, Your Honor, I submitted some requests to charge.

The Court: I know you did. Well, I have read them. I think that I have covered (1201) them. If not, make your request.

Mr. Crimi: Yes. Well, in relation to the offering in evidence of conversations, statements or declarations, Your Honor did cover most of it, but I don't think Your Honor mentioned the situation of the warnings to be clear and in understandable terms. That is the Miranda warnings.

The Court: I think I covered that by quoting from the statute. But certainly, the waiver has to be knowingly made, intelligently made and any confession can only be after giving warnings required by the constitution of New York State or the United States or the decided law of the Supreme Court.

If they are to be considered.

Mr. Crimi: Thank you, Your Honor. Now, the other thing under Section 310 of the Criminal Procedure Law, it appears that I have to request—

Excerpt from State Criminal Trial—
Charge to the Jury.

The Court: What do you request?

Mr. Crimi: I request that the Court state to the jury that the fact that the (1202) Defendant Kibbe did not testify is not a factor from which any inference unfavorable to him may be drawn.

The Court: I so charge you, members of the jury. That can absolutely not be used in any way against the Defendant Kibbe. This is absolute legal right not to testify or to offer any evidence.

Mr. Crimi: Thank you.

The Court: I don't think that is Section 310, however. Any thing else?

Mr. Crimi: Nothing Your Honor. Thank you.

The Court: You may swear the Court Attendants.

(Whereupon the Court Attendants were sworn by the Court Clerk.)

The Court: You may retire. The first 12 men who are in the jury and the other two will also retire to separate quarters and please do not discuss this case amongst yourselves.

(Whereupon the jury retired for deliberation at 4:50 P.M.)

(Whereupon the following transpired in the absence of the jury:)

The Court: Mr. Cornelius, do you (1203) consent that the jury take and receive such exhibits as were received in evidence as they may request?

Mr. Cornelius: Surely.

The Court: Do you, Mr. Beer?

Mr. Beer: Yes, the Defendant Krall agrees to that, Your Honor.

The Court: And do you, Mr. Crimi?

Mr. Crimi: Yes, Your Honor.

The Court: Do you, Mr. Krall and Mr. Kibbe consent?

Defendant Krall: Yes.

Excerpt from State Criminal Trial—
Charge to the Jury.

The Court: Do you, Mr. Kibbe?
Defendant: Kibbe: Yes.
The Court: All right.
(Whereupon Court recessed awaiting a verdict at 4:31 P.M.)
(Whereupon Court reconvened at 4:45 P.M.—defendants not present but by counsel.)
The Court: I did not think that it was necessary to have the defendants here because I think that this is a matter for the attorneys to handle. The request of the jury is three-fold. "Could we please have (1204) all evidence used." That means exhibits, and that's all right. The second request is: "Along with the original transcript that was taken in the Sheriff's Office." Now, that is not in evidence. So, I will have to tell them they can't have that. They can have testimony read, though. The third request: "Also, we would like to have the indictment so we can go over this and get things clear for us." That is the very thing I thought about. There are four different counts, and while the indictment is not in evidence, I'm wondering if it would be in error to let them have a copy of it so that they will understand and can read the different counts.
Mr. Crimi: I think they probably should have the indictment although it's not in evidence.
The Court: It's not in evidence, but only for the purpose of reading and understanding the different counts. So far, of course, they're in the record, but it would mean that they would have to come out each (1205) time and have the indictment read to them.
Mr. Crimi: I think we should give them a written list of the offenses.
The Court: That isn't what they want certainly, the murder charge is unusual and the robbery first charge is unusual and they want to see what words are used.

Excerpt from State Criminal Trial—
Charge to the Jury.

Mr. Beer: I don't think it would be proper, Judge. I think I have read comments and opinions that the indictment not being in evidence cannot be used or taken into the jury room.
The Court: It's the only sensible way in which any jury could read the words of an unusual charge contained in the indictment.
Mr. Cornelius: I was just wondering, Your Honor, suppose, since there is provision for submitting a written list, I'm wondering about Xeroxing that portion of the indictment which contains the four counts without the title.
The Court: Yes, an original list prepared by the Court containing the offenses.
(1206) Mr. Crimi: Well, let me say this, Your Honor, as far as I'm concerned, if Your Honor wants to give them the indictment I will not object to it if at the time it's delivered to them that you again repeat to them—
The Court: I would intend and endeavor to properly instruct them that it is delivered only for their information and is no proof or evidence of guilt whatever.
Mr. Crimi: Yes. I don't see how they can remember all of those words.
The Court: Yes, they're unusual words used there.
Mr. Beer: I will consent to it on that basis also, Your Honor.
The Court: Will you consent to it?
Mr. Crimi: Yes.
The Court: The defendants are here, but I think this is a matter—
Deputy Sheriff: I can get them in five minutes.
The Court: Well, maybe we better have (1207) them.
Deputy Sheriff: Yes, Your Honor.
The Court: Now, while we are waiting look it over with the indictment and see if it says the same thing. I think it does, it's a Xerox copy.

(Whereupon the defendants were brought into the courtroom at 5 o'clock P.M.)

(Whereupon a conference was held out of the hearing of the Court Reporter between counsel for the defendants and the defendants.)

The Court: Mr. Kibbe and Mr. Krall, the jury, among other requests has made the following: "Also we would like to have the indictment so we can go over this and get things clear to us." And, I propose to give them a Xerox copy of the indictment which has been read by your respective attorneys and compared to the original. Now, do either of you have any objection to that?

Defendant Krall: No.

The Court: Do you, Mr. Kibbe?

Defendant Kibbe: No, sir.

(1208) The Court: Do you, Mr. Crimi?

Mr. Crimi: No.

The Court: Or Mr. Beer?

Mr. Beer: No, Your Honor.

The Court: Or Mr. Cornelius?

Mr. Cornelius: No, Your Honor.

The Court: All right. Call the jury in.

(Whereupon the jury was brought back into the courtroom at 5:03 P.M.—jury present and polled—defendants present and polled and by counsel.)

The Clerk: Members of the jury, have you agreed upon a verdict?

The Foreman: No, we have not.

The Court: You may be seated. Members of the jury, I have from you the following communicatiton: "Could we please have all evidence used." That means, the exhibits received in evidence; does it not?

The Foreman: Yes.

The Court: Yes, you may have that. The second request: "Along with the original transcript that was taken in the Sheriff's (1209) Office." I'm sorry, that you can't

have. The transcript was not received in evidence. You may, if you wish, have the reporter read the questions asked and the answers given, but I cannot direct that you have the transcript. The third request: "Also, we would like to have the indictment so we can go over this and get things clear to us." I hand you a photostat copy of the indictment against Roy Krall and Warren Kibbe containing on the first and second page—the second page is turned over this way, four counts. This copy of the indictment is given to you only so that you can see what words are used and the different counts and consider whether the evidence as you find it has met the burden of proof of which I have advised you.

Once again, I repeat, the returning of an indictment or the indictment itself is no evidence or proof whatever of the guilt of either of the defendants of any of the crimes charged and cannot and must not be (1210) accepted by you or taken by you as any such proof. This copy of the indictment is being given to you with the consent of the defendants and their attorneys and the District Attorney, not as proof of anything, but only to let you know the wording of the indictment so that the accusations against these defendants may be clearly understood.

Is there any other cautionary advice that any of you counsel think should be given?

Mr. Cernelius: No, your Honor.

Mr. Beer: No, Your Honor.

Mr. Crimi: None, Your Honor.

The Court: All right. Are there any other questions, members of the jury?

The Foreman: No, Your Honor.

The Court: If not, you may retire.

(Whereupon the jury returned to deliberations at 5:08 P.M.)

(Whereupon Court reconvened at 9:15 P.M.—November 5, 1971—defendants present and by counsel.)

Excerpt from State Criminal Trial—
Charge to the Jury.

The Court: Gentlemen, let the record indicate that the defendants and their counsel and the Assistant District Attorney are all (1211) present. Gentlemen, one of the notes that I received from the jury is as follows and I quote: "We would like to be taken to the area in question on East River Road to see for ourselves where pole 215 is in regards to the gas station." Now, I propose to tell the jury that they cannot be conducted to the premises. My authority for that is Section 270.50 of the Criminal Procedure Law which reads as follows: "When the Court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed or of any other premises or place involved in the case will be helpful to the jury in determining any material factual issue, it may in its discretion at any time before the commencement of the summations order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this section." That apparently requires that any viewing of the premises be conducted at any time before the commencement of the (1212) summations, and I intend to hold that it cannot be done now.

All right, bring the jury in.

(Whereupon the jury was brought into the courtroom at 9:20 P.M.—jury present and polled—defendants polled and present by counsel.)

The Clerk: Members of the jury, have you agreed upon a verdict?

The Foreman: No, we have not, Your Honor.

The Court: Members of the jury, I have from you several communications, one reading as follows; and I quote: "We would like to be taken to the area in question on East River Road to see for ourselves where pole 215 is in regards to the gas station." My answer to that is as follows: According to Section 270.50 of the Criminal Procedure Law, and I quote from that section as follows, subdivi-

Excerpt from State Criminal Trial—
Charge to the Jury.

sion 1: "When the Court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed or of any (1213) other premises or place involved in the case will be helpful to the jury in determining any material factual issue it may in its discretion at any time before the commencement of the summations order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this section."

Members of the jury, I cannot direct that you view the premises at this stage of the proceedings. The law specifically provides that any time before the commencement of the summations. The summations have not only been commenced, they have been finished and therefore that request must be and is denied.

I have another request from you which reads as follows: "If found guilty of first count are they automatically found guilty on the second count? Please clear this for us." The answer to that question is that they are not automatically found guilty of any count, either of the defendants. If your verdict based (1214) upon the evidence and the law be one of guilty of the first count as to either or both defendants, that does not mean and I emyhasize, not, automatically mean or mean in any case that the defendants are found guilty of the other counts. Each count is a separate accusation and your verdict must be guilty or not guilty depending upon the evidence as to each count. Nothing is automatic. You may find one defendant guilty of one count and not guilty of another. Just by way of illustration so that your verdict, your finding of guilt on one count or the first count, to answer your question again, does not automatically mean that that defendant or those defendants are guilty on all counts. Do I make myself clear?

(Whereupon the jurors nodded in the affirmative.)

The Court: Now, the other question is as follows:

Excerpt from State Criminal Trial—
Charge to the Jury.

"Please explain all four counts again so that they will be clear to us and the laws that pertain to them."

The first count of the indictment naming (1215) Roy Krall and Barry Kibbe as defendants accuse each of them of a violation of Sections 20.00 and 125.25 of the Penal Law, namely that of murder and of criminal liability for the conduct of another. Now, as far as Section 20.00, I quote that to you as follows: "When one person engages in conduct which constitutes an offense another person is criminally liable for such conduct when acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes or intentionally aids such person to engage in such conduct." That is the section of the law under which each defendant is accused of being guilty of the wrongful acts of the other. Whether either defendant is guilty depends entirely upon the facts and the application of the law to them. First, you will note that a person who does not actually commit the act must act with the mental culpability required for the commission of the wrongful act, and he must solicit, request, command, importune or intentionally (1216) aid such person who commits the act to engage in such conduct. That is Section 20 as it's called.

Section 125.25, sub. 2 accuses these defendants, and each of them of the crime of murder. The section reads as follows: "A person is guilty of murder when under circumstances evincing a depraved indifference to human life he recklessly engages in conduct which creates a grave rish of death to another person and thereby causes the death of another person." All of those factors must coincide to render a person guilty of murder under that section. By the application of Section 20 the People accuse the other defendant of intentionally aiding and having the mental culpability required for the commission of the crime.

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Opinion of the Court of Appeals, April 8, 1976, As Amended, May 5, 1976.

Barry Warren KIBBE,
Petitioner-Appellant,

v.

Robert J. HENDERSON, Superintendent,
Auburn Correctional Facility,
Respondent-Appellee.

No. 554, Docket 75-2128.

United States Court of Appeals,
Second Circuit.

Argued Jan. 16, 1976.

Decided April 8, 1976.

As Amended May 5, 1976.

Before LUMBARD, SMITH and MANSFIELD, Circuit Judges.

LUMBARD, Circuit Judge:

After a jury trial in New York's Monroe County Court, Barry Warren Kibbe was found guilty on November 30, 1971 of murder, robbery in the second degree and grand larceny in the third degree. He brings this appeal from an order of the Northern District denying his petition for habeas corpus which was sought, in part, because the trial judge failed to charge the jury with respect to causation of death on the murder count. The bizarre circumstances that prompted Kibbe's apprehension and conviction for murder present one of those rare cases in which a habeas corpus petition pursuant to 28 U.S.C. § 2254 genuinely puts at issue the guilt or innocence of an accused. See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 250-75, 93 S.Ct. 2041, 2059-2072, 36 L.Ed.2d 854, 876, 890 (1973) (Powell, *J.,* concurring); *Ralls* v. *Manson,* 503 F.2d 491, 494-99 (2d

Cir. 1974) (Lumbard, *J.*, concurring). We hold that the trial judge's instructions permitted the jury, in its fact-finding process to disregard Kibbe's colorable claim that, as to the murder charge, his actions had not caused the death of a decedent and thus violated Kibbe's constitutional right to have every element of the crime with which he was charged proven beyond a reasonable doubt. We therefore grant the writ with respect to the murder count.[1]

Kibbe and his codefendant, Roy Krall, met the decedent, George Stafford, at a bar in Rochester, New York on the evening of December 30, 1970. Stafford had been drinking heavily and by about 9:00 p. m. he was so intoxicated that the bartender refused to serve him further. Apparently the defendants saw Stafford offer a one hundred dollar bill for payment, which the bartender refused. At some point during the evening, Stafford began soliciting a ride to Canandaigua from the other patrons in the bar. Kibbe and Krall, who confessed to having already decided to rob Stafford, offered a ride and the three men left the bar together. Before starting out for Canandaigua, the three visited a second bar. When the bartender at this bar also refused to serve Stafford because of his inebriated condition, the three proceeded to a third bar, where each was served additional drinks.

Kibbe, Krall and Stafford left for Canandaigua in Kibbe's car about 9:30 that evening. According to statements of the defendants, as Krall was driving the car, Kibbe demanded Stafford's money and, upon receiving it,

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[1] Kibbe also claims that the writ should issue because certain evidence admitted at trial was seized in violation of the Fourth Amendment proscription against unreasonable seizures. Even if Fourth Amendment claims are cognizable on habeas corpus, a matter presently before the Supreme Court, see *Wolff* v. *Rice*, —— U.S. ——, 96 S.Ct. ——, 46 L.Ed.2d ——, 44 U.S.L.W. 3485 (1976), we would find this claim to be without merit.

forced Stafford to lower his trousers and remove his boots to prove he had no more. At some time between 9:30 and 9:40 p. m., Stafford was abandoned on the side of a unlit, rural two-lane highway. His boots and jacket were also placed on the shoulder of the highway; Stafford's eyeglasses, however, remained in the car. There was testimony that it was "very cold" that night and that strong winds were blowing recently fallen snow across the highway, although the night was clear and the pavement was dry. There was an open and lighted service station in the general vicinity, but testimony varied as to its precise distance from the place where Stafford was abandoned. In any case, the station was no more than one-quarter of a mile away.

About half an hour after Kibbe and Krall had abandoned Stafford, Michael Blake, a college student, was driving his pickup truck nothbound on the highway at 50 miles an hour, ten miles per hour in excess of the posted speed limit. A car passed Blake in a southbound direction and the driver flashed his headlights at Blake. Immediately thereafter, Blake saw Stafford sitting in the middle of the northbound lane with his hands in the air. Blake testified that he "went into a kind of shock" as soon as he saw Stafford, and that he did not apply his brakes. Blake further testified that he did not attempt to avoid hitting Stafford because he "didn't have time to react." After the collision, Blake stopped his truck and returned to assist Stafford, whereupon he found the decedent's trousers were around his ankles and his shirt was up to his chest. Stafford was wearing neither his jacket nor his boots.

Stafford suffered massive head and body injuries as a result of the collision and died shortly thereafter. An autopsy revealed a high alcohol concentration of .25% in his blood. The Medical Examiner testified that these injuries were the direct cause of death.

Kibbe and Krall were apprehended on December 31, 1970. They were tried for robbery and for the murder of Stafford under New York Penal Law § 125.25(2) which provides:

> A person is guilty of murder in the second degree when:
>
> * * * * * *
>
> (2) Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.[2]

In his charge to the jury, the judge failed to define or explain the issue of causation as that term is used in § 125.25(2). No mention was made of the legal effect of intervening or supervening cause. Nevertheless, defense counsel failed to take any exception whatsoever to this omission. The jury returned guilty verdicts on the charges of second degree murder, second degree robbery, and third degree grand larceny. Kibbe was sentenced to concurrent terms of imprisonment of 15 years to life on the murder conviction, 5 to 15 years on the robbery conviction, and up to 4 years on the grand larceny conviction.

The Apellate Division affirmed the conviction on finding that there was sufficient evidence that Stafford's death was caused by appellant's acts "as well as by the acts of Blake." The court stated that while the trial judge's charge concerning causation was "lacking in detail" appellant had not questioned the sufficiency of the charge on appeal and no exceptions to or requests for a charge on causation had been made at trial. *People* v. *Kibbe*, 41 A.D.2d 228, 342 N.Y.S. 386 (4th Dept. 1973). Justice Cardamone dissented on the ground that the issue of causation should have been

[2] Intent to kill is not a requirement under the statute.

submitted to the jury. The New York Court of Appeals also found sufficient evidence of causation and unanimously affirmed the convictions. *People* v. *Kibbe*, 35 N.Y.2d 407, 362 N.Y.S. 2d 848, 321 N.E.2d 773 (1974). Although the sufficiency of the charge was argued before the Court of Appeals, the court held that it was within the Appellate Division's discretion to refuse to reverse on those grounds.

Kibbe then petitioned for habeas corpus in the District Court for the Northern District. Judge Foley denied the petition and, on the question of the jury charge, noted that the correctness of instructions does not raise a constitutional claim cognizable on habeas corpus.[3] Appeal to this court followed.

Deliberate Bypass

The state appellate courts declined to consider the sufficiency of the trial judge's charge because appellant failed at trial to take an exception to or make a request for an instruction respecting causation. Mindful of the limited role that federal courts must play in reviewing the convictions of state prisoners, we may inquire further regarding Kibbe's claims only if his omission did not consitute a deliberate bypass of the orderly procedures of the state courts.[4] *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

[3] Judge Foley cited *United States ex rel. Mintzer* v. *Dros*, 403 F.2d 42 (2d Cir. 1967) for this proposition. In that case, however, the court held only that the specific objections there at issue failed to raise questions of constitutional dimension.

[4] The interest of the state in protecting its procedural rules seems somewhat diminished here by the fact that on this appeal the Attorney General of New York has not even argued or briefed the theory that Kibbe deliberately bypassed his right to object to the trial judge's charge. See Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact Finding Responsibility, 75 Yale L.J. 895, 961-62 (1966).

This court has not hesitated to find a deliberate bypass that precludes federal habeas corpus relief when failure to make a contemporaneous objection, mandated by the state's valid procedural rules, comported with trial strategy contrived by the defendant and his counsel. See *United States ex rel. Terry* v. *Henderson,* 462 F.2d 1125 (2d Cir. 1972); *United States ex rel. Cruz* v. *LaVallee,* 448 F.2d 671 (2d Cir. 1971), cert. denied, 406 U.S. 958, 92 S.Ct. 2064, 32 L.Ed. 2d 345 (1972); *United States ex rel. Schaedel* v. *Follette,* 447 F.2d 1297 (2d Cir. 1971). In *Cruz,* for instance, where appellant had failed at trial to object to the admissibility of an allegedly coerced confession, the court determined that it was the deliberate and consistent trial strategy of the defense not to question the voluntariness of the defendant's statement. 448 F.2d at 673. It was found that questioning the validity of the confession would have conflicted with the defense tactic of conceding the defendant's act but asserting the existence of mitigating circumstances. Thus, the deliberate bypass of a contemporaneous objection precluded later habeas relief.

This case, however, presents a wholly different situation. It is clear from the 1300 pages of pre-trial and trial transcript that the defense strategy was to demonstrate that the immediate and culpable cause of Stafford's death was Blake's operation of his truck and not the defendants' conduct. Prior to commencement of trial, Kibbe's counsel unsuccessfully moved to dismiss the indictment on the ground that the grand jury testimony dealing with the murder count revealed that defendants had left Stafford off the road and that he had been killed by a collision in the middle of the highway. Counsel for both Kibbe and Krall cross-examined Blake extensively on the speed he was travelling, the weather and road conditions, and his reactions after he spotted Stafford in front of him. The attorneys also vigorously questioned the Medical Examiner to

establish that the collision was the immediate cause of Stafford's death. At the close of the prosecution's case, counsel renewed the motion to dismiss the murder count. Attorneys for both Kibbe and Krall argued the motion in terms of the prosecution's failure to demonstrate the necessary causation. Krall's attorney stated:

> It's our contention that the People's proof has failed to prove the guilt of the defendant beyond a reasonable doubt as a matter of law in connection with that count. The proof had been shown that the cause of death of this [decedent] was severe injuries sustained through being struck by an automobile which the driver of which testified to operating it at a speed of 50 miles an hour in a 40-mile an hour zone. That he saw this form on the roadway when a hundred, two hundred feet away and made no effort to avoid it because, as he said, he was shocked and therefore did not apply the brakes and did not swerve his wheels in an effort to avoid this man. The defendant Roy Krall was under no obligation to anticipate a result like that.

Kibbe's attorney joined in the motion with a similar argument. The motion to dismiss was renewed and denied once more at the close of the entire case.

In their summations to the jury, defense counsel again argued that insufficient proof of causation required a judgment of acquittal on the murder charge. Kibbe's counsel maintained that the evidence failed to demonstrate that Stafford was left in a helpless condition and that some of the indications of helplessness, e.g., the disarray of his clothing, may have been caused by the impact of the collision.

These constant references to causation indicate that Kibbe sought to convince the court and jury that his con-

duct was not the culpable factor in Stafford's death. Nevertheless, no objection was taken to the trial judge's failure to charge the jury on the question of causation. In light of the conscious trial strategy of the defense, however, we believe that this omission was obviously inadvertent and does not constitute a deliberate bypass. See *United States ex rel. Schaedel* v. *Follette*, 447 F.2d 1297, 1300 (2d Cir. 1971). We therefore proceed to consider the merits of appellant's petition.

Error in the Instruction

Kibbe now contends that the question of causation was a pivotal issue at trial and that the judge's failure to instruct the jury with respect to that issue allowed the jury to convict without finding that every element of the crime had been proven beyond a reasonable doubt. On the limited and singular facts of this case, we agree.

In order to satisfy the constitutional requirements of due process, a criminal conviction must be supported by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970). It is the essence of a fair trial and of the right to jury trial that the jury apply the reasonable doubt standard to determine those issues of fact that bear on the elements of the offense, see *United States* v. *Screws*, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495, 1505 (1945); *United States* v. *Hayward*, 136 U.S. App.D.C. 300, 420 F.2d 142 (1969), and presumably it is in accordance with this mandate that New York requires the trial judge to state to the jury "the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts. . . ." N.Y.C.P.L. § 300.10 (McKinney 1971). See *People* v. *Walker*, 198 N.Y. 329, 334, 91 N.E. 806 (1910) (every essential element of a crime presents a question of fact for the jury's exclusive determination).

In this case, by the language of the statute, the state was bound to prove to the jury beyond a reasonable doubt that appellant evinced a depraved indifference to Stafford's life, recklessly engaged in conduct that created a grave risk of Stafford's death, and thereby caused Stafford's death. The court scrupulously instructed the jury with respect to the meaning of "recklessly", "depraved", "grave", and "indifferent" as used in Penal Law § 125.25(2). The omission of any definition of causation, however, permitted the jury to conclude that the issue was not before them or that causation could be inferred merely from the fact that Staffords death succeeded his abandonment by Kibbe and Krall.

Even if the jury were aware of the need to determine causation,[5] the court's instruction did not provide the

[5] The trial judge made brief mention of the term "causation" in his charge when he stated: "You will not consider either (first degree manslaughter or second degree manslaughter) unless you feel that these defendants or either of them, was guilty of causing the death of George Stafford recklessly." This instruction, however, was given in the context of explaining the relation between reckless conduct and manslaughter rather than in the context of a definition of causation. In fact, by emphasizing "recklessly", the judge may have implied that the jury could assume causation and had only to determine whether recklessness was involved.

The above recounting of numerous instances in which the defense attempted to shift responsibility for Stafford's death away from appellant suggests that the jury may have been aware of the necessity of finding that appellant's conduct was the cause of that death. The motions to dismiss for failure of the prosecution to demonstrate causation, however, were made outside the presence of the jury; although the defense also raised the causation question in summations, Kibbe's counsel began his summation by noting that his remarks did not constitute evidence and that the trial judge alone was responsible for instructing the jury regarding the law. In the absence of an instruction concerning causation, the jury was unlikely to make the inference that it was to determine the question of causation from hearing the statute read and from listening to the defense examination of witnesses. In any event, there was no detailed definition of causation commensurate with the definitions of other terms in the statute.

tools necessary to that task. The possibility that jurors, as laymen, may misconstrue the evidence before them makes mandatory in every case instruction as to the legal standards they must apply. See *United States* v. *Burse*, 531 F.2d 1151 at 1153 (2d Cir. 1976). Error in the omission of an instruction is compounded where the legal standard is complex and requires that fine distinctions be made. That is most assuredly the situation in this case. It has been held that where death is produced by an intervening force, such as Blake's operation of his truck, the liability of one who put an antecedent force into action will depend on the difficult determination of whether the intervening force was a sufficiently independent or supervening cause of death. See W. LaFave & A. Scott, Criminal Law 257-63 (1972) (collecting cases).[6] The few cases

[6] The complexity of the definition of legal causation in LaFave and Scott, supra, demonstrates that an explanation of the concept of intervening and supervening cause would have been not merely helpful (as contended by Judge Mansfield), but essential to the jury's determination here. Given the proper standard for causation, the jury could have found that Blake had been so reckless as to absolve defendants of legal responsibility for Stafford's death:

> As might be expected, courts have tended to distinguish cases in which the intervening act was a *coincidence* from those in which it was a *response* to the defendant's prior action. An intervening act is a *coincidence* when the defendant's act merely put the victim at a certain place at a certain time, and because the victim was so located it was possible for him to be acted upon by the intervening cause. The case put earlier in which B, after being fired upon by A, changed his route and then was struck by lightning is an illustration of a coincidence. However, it is important to note that there may be a coincidence even when the subsequent act is that of a human agency, as where A shoots B and leaves him lying in the roadway, resulting in B being struck by C's car; or

(footnote continued on following page)

that provide similar factual circumstances suggest that the controlling questions are whether the ultimate result was foreseeable to the original actor and whether the victim

(footnote continued from preceding page)

> where A shoots at B and causes him to take refuge in a park, where B is then attacked and killed by a gang of hoodlums.
>
> By contrast, an intervening act may be said to be a *response* to the prior actions of the defendant when it involves a reaction to the conditions created by the defendant.
>
> Thus—though the distinction is not carefully developed in many of the decided cases—it may be said that a coincidence will break the chain of legal cause unless it was foreseeable, while a response will do so only if it is abnormal (and, if abnormal, also unforeseeable).
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> • • • • • •
>
> This kind of accident must be distinguished from a somewhat different situation, as where A, with intent to kill B, only wounds B, leaving him lying unconscious in the unlighted road on a dark night, and then C, driving along the road, runs over and kills B. Here C's act is a matter of coincidence rather than a response to what A has done, and thus the question is whether the subsequent events were foreseeable, as they undoubtedly were in the above illustration.[73]
>
> [73] *People* v. *Fowler*, 178 Cal. 657, 174 P. 892 (1918). Perhaps if C were driving in a reckless way, A would not be liable. If A in the Fowler case had merely an intent to injure, but not to kill, A would be guilty of manslaughter; but no doubt A, having put B in an unconscious or helpless position on a dark road, has an affirmative duty to act to pull him off the road, and failure to act under the circumstances where A knows death is substantially certain to occur (or even where he realizes there is a very high risk though no certainty of such death) should make him guilty of murder of the intent to kill (or of the depraved heart) variety.

Without a proper definition of causation, the jury, if it considered causation at all, could have found that Blake's conduct, no matter how reckless, could merely supplement and not supervene defendants' culpability.

failed to do something easily within his grasp that would have extricated him from danger.[7]

The New York appellate courts applied these standards and found that there was sufficient evidence to uphold the convictions. We have no reason to doubt that conclusion. There was evidence that Kibbe and Krall left Stafford near traffic and in an intoxicated condition without eyeglasses or sufficient clothing on a winter evening, and all of this could be considered to determine causation. The sufficiency of the evidence, however, is not the subject of our inquiry. Our sole concern is whether the jury was adequately instructed in order to make the same finding beyond a reasonable doubt. As this function was within the exclusive province of the jury, the appellate courts may not substitute their own findings for the jury's possible failure to consider the issue. See *United States* v. *Howard*, 506 F.2d 1131, 1134 (2d Cir. 1974). There was evidence that Kibbe and Krall abandoned Stafford near an open and lighted service station and that although Stafford was intoxicated he was not helpless. It also appeared that Blake was less than diligent in the operation of his motor vehicle. If the jury had been cognizant of the proper legal standards, this evidence, if believed, could have injected an element of reasonable doubt into the jury's deliberations as to whether defendants foresaw or could have foreseen that about one-half hour after they abandoned Stafford he would be struck in the middle of a highway lane by the driver of a speeding truck who failed to react in such a way to avoid a collision.

We are convinced that the trial judge's incomplete instructions took a necessary determination of causation

[7] See *State* v. *Preslar*, 48 N.C.Rep. 421 (1856) (deliberate choice of victim to forego place of safety exonerates defendant of liability for victim's subsequent death from exposure).

of death from the jury and thereby deprived appellant of his right to due process. See *United States ex rel. Smith* v. *Reincke*, 239 F.Supp. 887 (D.Conn.), aff'd, 354 F.2d 418 (2d Cir. 1965); cert. denied, 384 U.S. 993, 86 S.Ct. 1896, 16 L.Ed.2d 1010 (1966). See also *United States* v. *Singleton*, 532 F.2d 199 (2d Cir. 1976); *United States* v. *Hines*, 256 F.2d 561, 564 (2d Cir. 1958). Since the error in the instruction reaches constitutional dimensions, it may be corrected on habeas corpus. *Kenion* v. *Gill*, 81 U.S. App.D.C. 96, 155 F.2d 176 (1946). The writ is granted as to any detention arising from the murder conviction, unless retrial of the petitioner is commenced within 60 days from the date of the filing of this order.

MANSFIELD, Circuit Judge (dissenting):

With due respect I must dissent because in my view the deficiency in the trial judge's instruction regarding causation did not reach constitutional dimensions entitling the petitioner to federal habeas relief. See *Cupp* v. *Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368, 393 (1973); *Schaefer* v. *Leone*, 443 F.2d 182 (2d Cir. 1971).

There was ample evidence to support a finding by the jury beyond a reasonable doubt that the defendants were guilty of murder in violation of N.Y. Penal Law § 125.25 (2). The proof was clear that the defendants evidenced a depraved indifference to human life and that they recklessly engaged in conduct which not only created a grave risk of death to the victim, George Stafford, but was a direct cause of his death. See *People* v. *Kibbe*, 35 N.Y.2d 407, 362 N.Y.S.2d 848, 321 N.E.2d 773 (1974). On a dark, cold night (temperature 4°) the defendants placed their intoxicated victim into their automobile, drove away, robbed him and left him on a highway, with his boots off, his pants down or off, and stripped of eyeglasses he needed to be

able to focus. They deserted him at a point abount a quarter of a mile from the nearest shelter, a gasoline station located on the otherside of the highway. It was readily foreseeable that in his condition Stafford might be struck and killed by a motorist, which is what happened.

The jury was well aware that it had to find beyond a reasonable doubt that the defendants' conduct was a direct cause of Stafford's death and that death was not attributable solely to the motorist. In his summation the prosecutor argued repeatedly that although the immediate or direct cause of the victim's death was the conduct of the motorist who struck him, the reckless conduct of the defendants was a substantial producing cause of his death because they were "bound to anticipate that he would be struck by a car, struck and killed by a car" and "these two defendants were aware of and consciously disregarded a substantial and unjustifiable risk that death would result."[1] In his summation one defense counsel conversely argued that the cause of death was not his client's conduct but that of the motorist.

[1] "There is one other aspect that I'd like to talk about on this first count, and also actually in regard to the second count. As I mentioned not only does the first court contain reference to and require proof of a depraved indifference to a human life, it proves that the defendant recklessly engaged in conduct which created a risk of death in that they caused the death of George Stafford. Now, I very well know, members of the jury, you know, that quite obviously the acts of both of these defendants were not the only the direct or the most preceding cause of his death. If I walked with one of you downtown, you know, and we went across one of the bridges and you couuldn't swim and I pushed you over and you drowned because you can't swim, I suppose you can say, well, you drowned because you couldn't swim. But of course, the fact is that I pushed you over. The same thing here. Sure, the death, the most immediate, the most preceding, the most direct cause of Mr. Stafford's death was the motor vehicle, the truck driven by Mr. Blake that hit him right square, the middle of the grill, I think he said, that Mr. Stafford was seated or I forget how he described him, he's not standing up, or at least he's on his

(footnote continued on following page)

Against this background the trial judge instructed the jury that a person is guilty of murder in violation of § 125.25 when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, *and thereby causes the death of another person.*" (Emphasis added). Furthermore he instructed the jury that it could not consider the alternate crimes of manslaughter in the first degree or manslaughter in the second degree "unless you feel that these defendants or either of them, was guilty of causing the death of George Stafford recklessly."

No exception was taken by defense counsel to the charge as thus given by the court and no question was raised as to the sufficiency of the charge on defendants' appeal to the Appellate Division, see *People* v. *Kibbe*, 41 A.D.2d 228, 342 N.Y.S.2d 386 (4th Dept. 1973). The adequacy of the instruction was first raised by the dissenting opinion of one justice of the Fourth Department.

Although it might have been helpful to the jury to have a more definitive instruction on the element of causation, including an explanation of the concepts of proximate, superseding, and intervening causation, I cannot agree with the majority that such a detailed instruction was constitutionally required or that the failure to give it permitted "the jury to conclude that the issue was not before them." We are not here dealing with such fundamental unfairness as failure to advise the jury that the defendant

(footnote continued from preceding page)

knees or he is sitting down with his hands up in the middle of the northbound lane. Sure, that's the most direct cause of death. But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there. His glasses were taken and his identification was taken and his pants were around his ankles." (Tr. 1155-57).

was presumed to be innocent or the substitution by the court in its instruction of a preponderance-of-the-evidence for a reasonable doubt standard, see *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Here the jury plainly was made aware by the summations of the necessity of finding that the defendants' conduct was the cause of the victim's death even though it may not have been the only cause. In these circumstances the court's instruction was sufficient to enable the jury intelligently to go about its business. It was readily apparent to the jury, without detailed instructions on the subject, that it could not find the defendants guilty if death was attributable entirely to some intervening force which superseded the defendants' recklessly indifferent conduct. As the New York Court of Appeals unanimously concluded in affirming the conviction, the evidence was overwhelming that the defendants' conduct in depositing their intoxicated robbery victim on the highway in darkness and 4° weather, partially clothed and without eyeglasses, was the direct cause of his death.

> "The defendants do not dispute the fact that their conduct evinced a depraved indifference to human life which created a grave risk of death, but rather they argue that it was just as likely that Stafford would be miraculously rescued by a good samaritan. We cannot accept such an argument. There can be little doubt but that Stafford would have frozen to death in his state of undress had he remained on the shoulder of the road. The only alternative left to him was the highway, which in his condition, for one reason or another, clearly foreboded the probability of his resulting death." 35 N.Y.2d at 407, 362 N.Y.S.2d at 852, 321 N.E.2d at 776.

I cannot subscribe to the idea that on such a record they were denied any constitutional right by the brevity of the court's charge on causation. Their trial was a fair one.

Order of the Court of Appeals Stating Issuance of the Mandate, June 1, 1976.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of June, one thousand nine hundred and seventy-six.

Barry Warren Kibbe

Petitioner-Appellant

v.

Robert J. Henderson, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 26, 1976 to stay issuance of the mandate pending application to the Supreme Court for a petition for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

/s/ J. EDWARD LUMBARD (per WRM)
/s/ J. JOSEPH SMITH (per WRM)
/s/ WALTER R. MANSFIELD, Circuit Judges

Supreme Court, U. S.
FILED
AUG 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

-against-

BARRY WARREN KIBBE,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHEILA GINSBERG,
PHYLIS SKLOOT BAMBERGER,
WILLIAM E. HELLERSTEIN,
Attorneys for Respondent
THE LEGAL AID SOCIETY
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

-against-

BARRY WARREN KIBBE,

Respondent.

BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit granting the petition for writ of habeas corpus and included as Appendix A to the petitioner's appendix is now officially reported at 534 F.2d 493.

QUESTION PRESENTED

Whether the court of appeals applied established principles of law to the facts of this case and whether such application presents a substantial issue for consideration by the Court.

-1-

STATEMENT OF THE CASE

Respondent was convicted of second-degree murder[1] pursuant to New York Penal Law §125.25(2) which provides:

> A person is guilty of murder in the second degree when:
>
> 2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person;

The facts of this case, which were characterized by the majority opinion of the court of appeals as "bizarre", are set forth in the opinion of the court. (Pet. App. 3a-5a[2]). They indicate that at trial it was established that the victim, George Stafford, died as a result of injuries he sustained when he placed himself in the middle of the road and was hit by a speeding truck driven by a Michael Blake. The accident occurred at approximately 10:10 p.m.

Approximately 30 minutes before Blake's vehicle struck Stafford, respondent and his co-defendant Roy Krall had robbed Stafford and abandonned him on the shoulder of a two lane two directional roadway between Rochester and Canandaigua, New York. The three had met earlier in a bar in Rochester and had consumed substantial amounts of alcohol before Krall and respondent drove Stafford, at his request, to Canandaigua.

There was some dispute at trial as to where exactly respondent had left Stafford: the defense contended the spot was within view of and no more than 75 feet from an open and lighted gas station; the prosecution argued that it was one quarter of a mile from the station. The testimony did esta-

[1]Respondent's other convictions for robbery in the second degree and grand larceny in the third degree were unaffected by this habeas corpus proceeding. Respondent was sentenced to five to fifteen years on the robbery conviction, and up to four years on the grand larceny conviction. He is presently serving those sentences.

[2]Numberals in parenthesis preceded by "Pet. App." are referances to pages in the appendix to the petition.

-2-

blish without contradiction that prior to the time that the truck driver Blake saw Stafford in the road, Blake was warned that something was wrong by an on-coming motorist who had signalled to Blake by flashing his headlight. Immediately thereafter Blake saw Stafford sitting in the middle of the north-bound lane, but, although the road was dry, he did not apply his brakes or an attempt to avoid hitting him.[3] According to Blake, he didn't have time to react.

The defense to the murder charge was that respondent's conduct did not cause Stafford's death. Cross-examination of the prosecution's witnesses was directed at establishing Blakes' responsibility for Stafford's death. Defense motions prior to trial, after the prosecution rested and at the close of the entire case, sought relief on the grounds that the State had failed to demonstrate causation.

Despite the fact that causation was the critically disputed element at the trial, the instruction to the jury on the murder charge was devoid of any instruction on this complex legal issue. Indeed, the only reference to causation was the single use of the word itself in the verbatim recital of the penal law section involved.

The court of appeals majority, restricting its decision to "the limited and singular facts of this case," held that the omission of an instruction on the element of causation permitted the jury to conclude that causation was not an issue or that causation could be inferred merely from the fact that Stafford would not have died "but for" respondent's conduct. (Pet. App. 9a-10a). The court of appeals explained that the

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[3]The testimony was that the wind was blowing some fallen snow but it was undisputed that the sky and the road remained clear.

absense of an instruction on the difficult concepts of indipendent or supervening cause prevented the lay jury from resolving disputed questions of fact so as to determine the controlling issues in the case: whether the ultimate result was foreseeable to respondent, and whether the actions of the truck driver and/or Stafford were superceding causes (Pet. App. at 10a-12a).[4] The court concluded:

> . . . There was evidence that Kibbe and Krall abandoned Stafford near an open and lit service station and that although Stafford was intoxicated he was not helpless. It also appeared that Blake was less than diligent in the operation of his motor vehicle. If the jury had been cognizant of the proper legal standards, this evidence, if believed, could have injected an element of reasonable doubt into the jury's deliberations as to whether defendants foresaw or could have foreseen that about one-half hour after they abandoned Stafford he would be struck in the middle of a highway lane by the driver of a speeding truck who failed to react in such a way to avoid a collision.
>
> We are convinced that the trial judge's incomplete instructions took a necessary determination of causation of death from the jury and thereby deprived appellant of his right to due process. See United States ex rel. Smith v. Reincke, 239 F.Supp. 887 (D. Conn.), aff'd, 354 F.2d 418 (2d Cir. 1965); cert. denied, 384 U.S. 993 (1966). See also United States v. Singleton, Docket No. 75-1114 (2d Cir. Feb. 13, 1976); United States v. Hines, 256 F.2d 561, 564 (2d Cir. 1958). . . .
>
> (Pet. App. at 13a)

REASONS FOR DENYING THE WRIT

Petitioner seeks review of the court of appeals decision on the ground that the court failed to comply with the dictates of Cupp v. Naughton, 414 U.S. 141 (1973) in that it did not evaluate the challenged jury instruction in the context of the entire case.

I.

Review of the majority opinion establishes that the court of appeals scrupulously complied with Cupp v. Naughton, supra.

---

[4] While the dissenting opinion acknowledges that the charge on causation could have been more "definitive" and should have included an explanation of "proximate," "superseding" and "intervening" causation, the opinion concludes that summations by counsel sufficed to apprise the jury of what they had to determine (Pet. App. at 16a).

As an initial matter the opinion carefully assessed and rejected the claim that the arguments of counsel compensated for the omission in the charge. The opinion points out how all the defense motions on the failure to establish causation were made outside the presence of the jury. Further, the opinion explains that the causation argument included in defense counsel's summation was neutralized by defense counsel's correct statement that the remarks of counsel did not constitute evidence and that the trial judge alone was responsible for instructions on the law[5] (Pet. App. at 10a n.5). See also, Bollenbach v. United States, 326 U.S. 607, 612 (1946).[6]

Moreover, the majority's detailed analysis of the evidence in the context of the law of causation support the court's holding that the deficiencies in the charge prevented the jury from making the requisite findings on the element of causation. Specifically, the opinion enumerates how an explanation of "intervening" and "supervening" cause, though absent here, was "essential" to the jury's evaluation of Blake's conduct

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[5]Ironically, the dissenting opinion which accepts the theory of "corrective summations" relies for support on a portion of the prosecutor's summation which misinformed the jury on the criterion by which they were to assess causation. In pertinent part, the summation provided:

> . . . Or to put it differently, would this man be dead had it not been for the acts of these two defendants?
> (Pet. App. n.1 at 15a)

If the jury had indeed been guided by this summation it would have concluded simply, but incorrectly, that causation was established merely by a finding that "but for" the respondent's actions, Stafford would not have died. W. La Fave and A. Scott, Criminal Law 257-63 (1972).

[6]In an Amicus Curiae petition the Monroe County District Attorney argues that the error in the charge was waived, an issue that the New York State Attorney General properly declined to raise. Both the majority and dissenting opinions of the court of appeals make plain that the issue of causation was repeatedly raised by the defense, that both the prosecutor and the trial judge were aware that it was the focal point of the defense, and that the failure to object to the charge was merely "inadvertent" (Pet. App. 6a-9a).

for purposes of determining if he had been so reckless as to absolve respondent of legal responsibility (Pet. App. at 11a n.6).

Similarly, the opinion makes clear that the failure to instruct precludes comprehension of the importance of certain disputes as to fact. For example, absent instruction, the jury had no way of knowing that determination of where Stafford had been left on the road was critical on the controlling questions of foreseeability to respondent and whether Stafford failed to do something easily within his grasp to extricate himself from danger (Pet. App. at 12a-13a).

On these facts, the court below recognized that a jury, properly instructed, might well have been left with a reasonable doubt as to respondent's legal responsibility for Stafford's death. Therefore, the court was correct in its conclusion that:

> . . . the trial judge's incomplete instructions took a necessary determination of causation of death from the jury and thereby deprived appellant of his right to due process. See United States ex rel Smith v. Reincke, 239 F. Supp. 887 (D. Conn.), affirmed 354 F.2d 418 (2d Cir. 1965); cert. denied, 384 U.S. 993 (1966). See also, United States v. Singleton, Docket No. 75-1114 (2d Cir. Feb. 13, 1976); United States v. Hines, 256 F.2d 561, 564 (2d Cir. 1958).

II

Petitioner does not contest the principle that errors in a state court jury instruction can result in a denial of due process cognizable in a federal habeas corpus proceeding. Cupp v. Naughton, supra, 414 U.S. at 146-7; Cool v. United States, 409 U.S. 100 (1972); In re Winship, 397 U.S. 358, 364 (1970). See also Vachon v. New Hampshire, 414 U.S. 478, 480 (1974). Rather, the claim is that the conceded deficiencies in the charge here were adequately ameliorated by the arguments

of counsel in summation so as to preclude finding a due process violation. Certiorari should not be granted solely to review the court of appeals application of established and uncontested principles of law to the particular and unique facts of any one case.

Petitioner's dire prediction that the majority opinion will open the flood gates to "hundreds" of habeas corpus petitions is belied by the fact that the court of appeals complied with the requirements of Cupp v. Naughton, supra. The decision creates no new law and by its own language, is restricted to "the limited and singular facts of this case" (Pet. App. at 9a).

CONCLUSION

Since the decision below is correct and since there is no substantial question presented to the Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

SHEILA GINSBERG,
PHYLIS SKLOOT BAMBERGER,
WILLIAM E. HELLERSTEIN,
THE LEGAL AID SOCIETY
Attorneys for Respondent
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

BARRY WARREN KIBBE,

Respondent.

BRIEF FOR PETITIONER

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3385

SAMUEL A .HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
of Counsel

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In the

Supreme Court of the United States

OCTOBER TERM, 1976

75-1906

Robert J. Henderson, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

Barry Warren Kibbe,

Respondent.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 534 F. 2d 493 and appears in the appendix at A. 105-120. The opinion of the United States District Court for the Northern District of New York is unreported and is reproduced in the appendix at A. 20-23.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 8, 1976 and an order amending the judgment and opinion was entered on May 4, 1976. A timely petition for rehearing or rehearing *en banc* was denied on May 21, 1976.

Question Presented

Did the challenged jury instruction regarding causation deprive respondent Kibbe of a fundamentally fair trial when the issue of causation was focused for the jury by both defense counsel and the prosecution throughout the trial and in their summations?

State Statute Involved

Former New York Penal Law:

"§ 125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

• • •

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person;"

Statement of the Case

A. Introduction

Respondent Barry Warren Kibbe is presently confined pursuant to a judgment of conviction for the crimes of murder in the second degree, robbery in the second degree, and grand larceny in the third degree, rendered by the Monroe County Court after a trial by jury. Respondent was sentenced to 15 years to life on the murder count, 5 to 15 years on the robbery count, and up to 4 years on the grand larceny count. His conviction was affirmed by the Appellate Division, *People* v. *Kibbe*, 41 A D 2d 228, 342 N.Y.S. 2d 386 (4th Dept. 1973), and the Court of Appeals. 35 N Y 2d 407, 362 N.Y.S. 2d 848, 321 N.E. 2d 773 (1974).

B. The Crime

On December 30, 1970, the victim of this crime, one George Stafford, was drinking heavily in a Rochester bar with Kibbe and his co-defendant, Roy Krall. Stafford, who was thoroughly intoxicated, had been flashing one hundred dollar bills in the bar. He inquired if anyone would give him a ride and Kibbe and Krall, who later confessed that they had already decided to steal his money, agreed. After another few drinks in another bar, they entered Kibbe's car at approximately 9:30 P.M.

While Krall drove, Kibbe slapped Stafford several times and took his money. Kibbe made Stafford lower his trousers and take off his boots to prove that he had no more money. Stafford was then abandoned on the shoulder of a rural and unlit, two-lane road which was snow-banked on both sides. Stafford, who was still in a state of partial undress, was left deserted with his jacket and boots placed next to him. His eyeglasses, which he wore at all times, were left in the car.

The temperature was near zero and gusting winds at times obscured visibility, although it was not snowing. The road was not lighted and there were no nearby buildings. The closest structure was an open gasoline station which was located on the *other* side of the highway. Conflicting testimony placed the building from 75 feet to one quarter of a mile from the spot where Stafford was left.

At approximately ten o'clock that night, William Blake, a college student, was driving northbound on the same road at 50 miles per hour, 10 miles over the speed limit. Two approaching cars flashed their headlights at his pick-up truck. Immediately thereafter he saw Stafford sitting in the middle of the road. Blake went into shock and did not have time to react; he hit Stafford. He stopped to aid Stafford, who was not wearing his jacket or boots. Stafford died shortly thereafter of massive head injuries. Tests by the medical examiner revealed a high degree of intoxication.

C. The Trial and Charge to the Jury

Kibbe and his co-defendant were indicted, *inter alia*, for murder in the second degree, former N.Y. Penal Law § 125.25(2), which provided that a person is guilty of murder when:

> "2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

The issues of causation and foreseeability were foremost in the minds of counsel. At oral argument of a pretrial motion to dismiss the indictment, Kibbe's counsel contended that there was insufficient evidence before the grand jury to support the murder charge (A. 24-25).* In reply, the prosecutor argued that given the circumstances of that evening, it was certainly within the knowledge and expectation of the defendants that death by vehicle might result (A. 26-27). Kibbe's attorney responded that death by vehicle was too "attenuated" from defendants' activities to support the charge (A. 27-28). The motion was denied.

In his opening remarks to the jury, the trial judge instructed that the opening statements by counsel may be considered a preview of what each side intends to prove (A. 41). The prosecutor specifically argued that he would prove that knowledge of Stafford's condition and the co-defendants' conduct indicated a depraved indifference to human life which "ultimately caused the death of Mr. Stafford" (A. 44). He pointed out that there was no allegation of intent to cause death. The prosecutor argued further that:

> ". . . their [the co-defendants'] acts, perhaps it [sic] was not the sole cause of death, because quite obviously, the direct or precedent agent of the catalyst causing the death was the truck driven by Mr. Blake. But nevertheless, their acts were responsible and were a cause, an approximate cause of the death of Mr. Stafford" (A. 44).

* References to the appendix submitted to this Court are preceded by the letter "A".

As the Court of Appeals found, it was clearly the strategy of defense counsel, both before and during the trial, to demonstrate that the immediate and culpable cause of Stafford's death was not defendants' conduct but Blake's operation of the truck (A. 110-112). To this end, Blake and the medical examiner were vigorously cross-examined by the defense (Blake, A. 48-53; Medical Examiner, Tr. 671-675).*

At the close of the prosecution's case, defense counsel against sought dismissal of the indictment (A. 29-39). Krall's attorney argued tht the cause of Stafford's death was the vehicle and that Krall was under no obligation to anticipate such a result (A. 29). Kibbe's attorney also argued that Stafford's death could not have been foreseen (A. 32). The assistant district attorney replied directly (A. 35-37). The motion was denied then and again at the close of the entire case when it was renewed (A. 40).

The summations of counsel dealt not only with issue of causation of death but also focused directly on foreseeability and intervening causes. Kibbe's counsel read the language of the indictment, accenting the elements of the crime. He argued that the jury would have to conclude that Kibbe was in a position to "perceive and disregard" a grave risk to Stafford. Counsel contended that Kibbe was not bound to anticipate that Stafford would sit in the middle of the road and that a speeding driver would happen by and freeze at the wheel (A. 68). Krall's attorney told the jury that if there were any depraved indifference

* References to sections of the trial transcript not included in the appendix are preceded by "Tr.". The transcript is being filed with the Clerk of this Court by respondent's attorney.

to human life, it was on behalf of motorist Blake, who failed to act and accordingly "caused" Stafford's death (A. 70).

The prosecution's summation was equally on point. The assistant district attorney repeatedly argued that defendants' reckless conduct caused Stafford's death (A. 72-76). He stated precisely why he believed that death by vehicle could have been anticipated by defendants (A. 73-75). Finally, the prosecutor spoke directly on the issue of causation and intervening events:

> "As I mentioned not only does the first count contain reference to and require proof of a depraved indifference to a human life, it proves [sic] that the defendant recklessly engaged in conduct which created a risk of death in that they caused the death of George Stafford. Now, I very well know, members of the jury, you know, that quite obviously the acts of both of these defendants were not only the direct or the most preceding cause of his death. If I walked with one of you downtown, you know, and we went across one of the bridges and you couldn't swim and I pushed you over and you drowned because you can't swim, I suppose you can say, well, you drowned because you couldn't swim. But of course, the fact is that I pushed you over. The same thing here. Sure, the death, the most immediate, the most preceding, the most direct cause of Mr. Stafford's death was the motor vehicle . . . But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the acts of these defendants, did indeed cause the death of Mr. Stafford." (A. 75-76).

The trial court specifically instructed the jurors that the arguments of counsel were advanced for their help and could be followed as long as they were based on evidence in the record (A. 82).

The trial judge began his charge to the jury by reading the indictment; the count charging second degree murder followed the language of the statute (A. 77). While the judge defined the terms "recklessly," "depraved," "grave," and "indifferent", he did not specially define "cause" (A. 89-90). He did charge that *all* elements of the crime must be proved beyond a reasonable doubt and immediately followed this instruction with a reiteration of the elements of second degree murder (A. 90-91). Preceding his charge on manslaughter, the judge instructed that it should not be considered unless the jury felt that the defendants were guilty of causing Stafford's death (A. 91).

Upon its own request, the jury was given a copy of the indictment so the language of the various counts would be before them (A. 101; see A. 98-99). As previously stated, the indictment followed the language of the statute. The judge stated:

> "This copy of the indictment is given to you only so you can see what words are used and the different counts and consider whether the evidence as you find it has met the burden of proof of which I advised you." (A. 101).

When the jury returned a few hours later and requested an explanation of all four counts, the Court repeated the exact language of § 125.25(2) and said:

> "*All* of these factors must coincide to render a person guilty of murder under that section." (A. 104) (emphasis added).

The defense was satisfied that the issue of causation was sufficiently and properly before the jury; there was no objection to this aspect of the charge and no request for a separate instruction on causation.

D. Prior State Proceedings

Kibbe's judgment of conviction was affirmed on appeal. His brief to the Appellate Division did not challenge the jury charge. However, the dissenting judge in the Appellate Division *sua sponte* raised the issue of the jury charge and held that he would reverse in the interest of justice (N.Y. Crim. Pro. Law § 470.15[3][c], [6][a]) because the instruction was inadequate. *People* v. *Kibbe, supra,* 41 A D 2d at 230-233. While noting the defendants' failure to challenge the charge, the majority did consider it in the interest of justice. Although lacking in detail, the Court held that "the charge together with the language of the statutes and indictment and the evidence were sufficient to inform the jury on this subject and reversal of the judgments is not required in the interest of justice." *Id.* at 230.

The Court of Appeals refused to disturb the Appellate Division's discretionary determination that the conviction would not be reversed in the interest of justice. *People* v. *Kibbe, supra,* 35 N Y 2d at 413-414.

E. Prior Federal Proceedings

Petitioner's habeas corpus application to the United States District Court for the Northern District of New York was denied on June 27, 1975 (A. 20-23). As to the challenge to the jury instruction, the Court held that the claim did not raise a question of federal constitutional dimensions (A. 21).

On April 8, 1976, the Court of Appeals reversed, granting the writ as to the murder conviction, with a dissent by Judge Mansfield (A. 105-120).* The majority of the panel

* Petitioner also claimed that certain evidence admitted at trial should have been suppressed. Assuming *arguendo* the issue cognizable on habeas corpus, the Court held that it was without merit (A. 106 n. 1).

On its own, the Court of Appeals raised the question of whether

(footnote continued on following page)

reasoned that the failure of a trial court to adequately instruct a jury on any element of the crime deprives the defendant of his right to have the jury apply the reasonable doubt standard to that element and make a finding that the proof on that element is sufficient beyond a reasonable doubt (A. 112, 116-117).

While recognizing that the evidence and summations by counsel raised the issue of causation (A. 110-112), the majority did not evaluate the challenged instruction within the context of the entire charge and the whole trial as required by this Court's decision in *Cupp* v. *Naughten,* 414 U.S. 141. 147 (1973). Indeed, the majority did not cite the *Cupp* decision.

The Court faulted the trial judge for his failure to define causation when he defined the other elements of the crime. The Court speculated that the jury may have concluded that the issue of causation may not have been before it or that it could infer causation from the chronological sequence of events (A. 113). Alternatively, even if the jurors were aware of their duty to determine causation, the majority thought that the instruction was inadequate to the task because the legal standard was complex. The Court stated that with a proper instruction as to intervening force, supervening cause, and foreseeability, the jury might have found that Kibbe did not foresee or could not have foreseen that the victim would have been struck by a truck (A. 113-116).

(footnote continued from preceding page)

Kibbe had deliberately bypassed orderly state procedures by failing to object to the charge and concluded that the omission was not strategic but inadvertent (A. 109-112). The Court predicated its discussion on the erroneous conclusion that the jury charge had not been reviewed by the state courts (A. 109). However, it is clear that the Appellate Division exercised its statutory discretion and reviewed the charge in the interest of justice. *People* v. *Kibbe, supra,* 41 A D 2d at 230. See *ante* at 8. Since the state court entertained the claim on the merits, Kibbe could not be barred from seeking federal habeas corpus relief and discussion of deliberate bypass was not indicated. *Fay* v. *Noia,* 372 U.S. 391, 439 (1963). See also *Lefkowitz* v. *Newsome,* 420 U.S. 283, 292 n. 9 (1975).

Judge Mansfield, dissenting (A. 117-120), held that the challenged charge did not reach constitutional dimensions entitling Kibbe to habeas corpus relief. In obvious agreement with Kibbe's own defense attorney and the Appellate Division, the dissent found that against the background of the summations and the overall charge, the jury was plainly aware of the necessity of finding that defendants' conduct was the cause of death, although it may not have been the only cause. "In these circumstances the court's instruction was sufficient to enable the jury intelligently to go about its business" (A. 120). Accordingly, the absence of a more definitive instruction on the element of causation did not raise an issue of fundamental fairness sufficient to reverse a state conviction in a federal habeas corpus proceeding.

ARGUMENT

When the challenged jury instruction is evaluated in the context of the entire charge and trial, as required by *Cupp* v. *Naughten*, 414 U.S. 141 (1973), it is manifest that respondent Kibbe received a fundamentally fair trial.

A.

Ordinarily, the sufficiency of a jury instruction in a state criminal trial is a matter of state law only; absent a showing that the alleged error deprived the defendant of a federal constitutional right, the charge is not reviewable by a federal court.* A jury instruction challenged under the Due Process Clause is elevated to such a violation only if the giving of the instruction "so offended established notions of due process as to deprive the respondent [defendant] of a constitutionally fair trial." *Cupp* v. *Naughten* ("Cupp"), 414 U.S. 141, 144 (1973).

* E.g. *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *United States ex rel. Stanbridge* v. *Zelker*, 514 F. 2d 45, 50 (2d Cir. 1975); *United States ex rel. Smith* v. *Montanye*, 505 F. 2d 1355, 1359 (2d Cir. 1974).

The exceptional case can be made out only after analyzing the instruction under the carefully delineated standard propounded in *Cupp*, 414 U.S. at 147. The Court below did not make such ananalysis and erroneously concluded that respondent Kibbe's due process right was violated because the state trial judge did not define the word cause for the jury.

The mandate in *Cupp* was clear:

> "In determining the effect of this instruction on the validity of respondent's [state] conviction, we accept at the outset the well-established proposition that a single instruction may not be viewed in artificial isolation but must be viewed in the context of the overall charge. *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States*, 409 U.S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus, not only is the challenged instruction but one of many such instructions, but the process of instruction is but one of many components of the trial which may result in the judgment of conviction." *Cupp*, 414 U.S. at 147.

Accord, United States v. *Park*, 421 U.S. 658, 674-675 (1975); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926).*

In *Cupp, supra*, a state prisoner seeking habeas corpus relief challenged the giving at his trial of a presumption-of-truthfulness instruction, claiming that it conflicted with or shifted the prosecution's burden to prove guilt beyond a reasonable doubt. The instruction at issue had been

* Conversely, recognition that a jury will consider the entire proceeding, despite instructions to the contrary, was the basis for this Court's holding in *Bruton* v. *United States*, 391 U.S. 123 (1968).

almost uniformly condemned by the federal courts of appeals. 414 U.S. at 143-144 and n. 4. This Court reiterated the well-established proposition that a challenged jury instruction must be evaluated in light of the entire proceeding and carefully noted the distinction between trial error which can be corrected in the exercise of an appellatee court's supervisory authority and constitutional error which would justify the reversal of a state conviction. *Id.* at 145-146 (see *post* at 17).* This Court found no fundamental unfairness when the allegedly ailing instruction was viewed in light of the entire charge, which included instructions on the presumption of innocence, the State's burden of proof, and the credibility of witnesses.

In the case at bar, the Court of Appeals made no such analysis. In discussing the possibility of deliberate bypass (see *ante* at 8-9n*), the Court found that the clear strategy of the defense was to demonstrate that the cause of death was due to the motorist's conduct, not the defendants'. Some of the "constant references" to causation, said the Court, were the cross-examinations directed to this end and the discussion of causation in counsel's summations (A. 110-112). Nonetheless, when the Court reached the second aspect of its decision, the alleged error in the charge, it did an abrupt about-face and held that the failure of the trial judge to define causation allowed the jury to conclude that the issue was not before them or could be merely inferred

* Similarly, due process analysis requires that a claim regarding a prejudicial comment by a prosecutor be evaluated in the context of the entire trial since it is but "one moment" of the proceeding. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 645 (1974). And, when the trial court neglects to charge on the issue of identification, which is the primary defense at a criminal trial, a state conviction will not be upset if the obvious impact of the testimony, arguments of counsel, and other portions of the charge have adequately focused the jury's attention on the issue. E.g. *United States ex rel. Winfield* v. *Cascles*, 403 F.Supp. 956 (S.D.N.Y. 1975). See also *United States* v. *Evans*, 484 F.2d 1178, 1187-1188 (2d. Cir. 1973) (federal appeal).

from the time sequence of the events (A. 113). Alternatively, the court below thought that even if causation was generally before the jury, the instruction was inadequate to the complex legal issue (A. 113-116).*

The Court of Appeals' failure, and apparent refusal, to weigh the entire proceeding to ascertain if causation was presented to the jury in a constitutionally acceptable manner was clear error. As the dissent below found, the jury in this case was plainly aware that it must find beyond a reasonable doubt that defendants' conduct, not an intervening force, was the cause of Stafford's death (A. 118, 120). To suggest that this jury was inadequately focused on the issues of causation and foreseeability is to ignore the very lifeblood of the trial. The entire case, for both sides, was built on the dramatic issue of causation; indeed, no other defense to the murder charge was suggested.

This is not a case in which the trial judge neglected to charge on an element of the crime or improperly withdrew an issue from the jury's consideration. E.g. *United States* v. *Singleton*, 532 F. 2d 199, 204-207 (2d Cir. 1976); *United States* v. *Hines*, 256 F. 2d 561, 564 (2d Cir. 1958). The judge specifically informed the jury that causation was an element of the crime and that *all* elements of the crime must be proved beyond a reasonable doubt. Additionally, the jury had a copy of the indictment.

Nor was this charge sprung on the unwary; it was given to twelve jurors who for several days had listened to noth-

* The Court suggested that the two controlling questions as to which instructions should have been given were the foreseeability of the ultimate result of defendants' conduct and whether the victim failed to extricate himself from danger (A. 114-116). Foreseeability was clearly focused for the jury. The second issue, however, warranted no instruction in this case. First, the only case cited by the court below was an 1856 North Carolina case in which a victim reached a place of apparent safety and chose to forego it. *State* v. *Preslar*, 48 N.C. Rep. 421 (1856). This is hardly authority for a constitutional requirement that such an instruction be given. Second, the case is not applicable to the instant fact situation since there was no intimation, let alone evidence, that Stafford reached a refuge of which he chose not to avail himself.

ing but evidence and arguments of counsel on the issues of causation and foreseeability. The opening statement of the prosecution went directly to the heart of the case, arguing that defendants' conduct, while not the sole cause of death, nonetheless was responsible for and was a cause of death. As the court below found, the vigorous cross-examination of the motorist and medical examiner by defense counsel was specifically directed to the issue of causation.

Finally, the issues of causation and foreseeability were explicitly raised and discussed in the summations of the People and the defense.* The prosecutor argued that defendants' reckless conduct caused Stafford's death. He also carefully reiterated the circumstances surrounding Stafford's abandonment—his intoxication, his state of partial undress and lack of needed eyeglasses, the weather, and his placement on the side of the road opposite the nearest lighted structure—and argued that death by motor vehicle was clearly foreseeable in light of these circumstances.

Defense counsel discussed whose conduct had caused Stafford's death, read with emphasis the elements of second degree murder, and argued that there was reasonable doubt as to whether defendants were bound to anticipate death by a vehicle.** The importance of these summations should not be underestimated. See *Herring* v. *New York*, 422 U.S. 853, 862-863 (1975). The courts have uniformly held that a defendant's counsel has a right to make a closing summation to a jury (*id.* at 858 and n. 8), and in *Herring* this Court held that the same right inheres at a bench trial.

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* The court below discounted the summations because Kibbe's counsel told the jury that his remarks were not evidence and that the judge would instruct them (A. 113 n. 5). Of far greater significance, of course, is the fact that the trial court told the jury that counsel's arguments were advanced for the jury's assistance and could be followed as long as they were based on evidence received (A. 82).

** This Court is respectfully referred to the factual statement presented *ante* at 4-7 for details of the proceedings before the jury.

It is significant that the two defense atorneys, who well understood the issues in the case (*ante* at 4-6), did not object to the charge as given, obviously satisfied that in the context of the trial, the jury was well aware of its responsibilities. Indeed, even with the benefit of the hindsight afforded to them in reviewing the transcript for appeal, defense counsel were still satisfied that causation was properly before the jury. They did not challenge the jury charge in their briefs to the Appellate Division. Surely the judgment of the defendants' attorneys, whose competency has never been challenged, is entitled to considerable weight by reviewing courts.

In the circumstances of this trial, "the court's instruction was sufficient to enable the jury intelligently to go about its business." (Dissent, Court of Appeals, A. 120; *People* v. *Kibbe*, 41 A D 2d at 230). It is not a sufficient ground for overturning a state conviction that a federal court find an instruction "undesirable, erroneous, or even 'universally condemned' ". *Cupp*, 414 U.S. at 146. The only issue properly before the Court in this case is whether the challenged charge deprived Kibbe of a fundamentally fair trial. To isolate the absence of a specific definition of the word cause and speculate on the ways this could confuse the jury, while ignoring the context of the entire proceeding, was egregious error. The only question is whether the absence of a definition of cause or lack of more detail "so infected the entire trial so that the resulting conviction violates due process." *Id.* Properly analyzed in the context of the complete charge and the entire trial, the alleged error in the instruction manifestly did not deprive the jury of consideration of the element of causation. Kibbe's trial met the Fourteenth Amendment requirement of fundamental fairness.

B.

The deprivation of due process in a state criminal trial is the "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*,

314 U.S. 219, 236 (1941). This standard, which has been recently reaffirmed by this Court, *Donnelly* v. *DeChristoforo, supra,* 416 U.S. at 642-643; *Cupp,* 414 U.S. at 145-147; *Milton* v. *Wainwright,* 407 U.S. 371, 377 (1972), aptly describes the function of a federal habeas court reviewing a state conviction.

The jury instruction test propounded by this Court in *Cupp* is precisely adapted to this end. It requires that the challenged instruction be evaluated in the context of the whole proceeding to ascertain if it "so infected the entire trial that the resulting conviction violates due process." *Cupp,* 414 U.S. at 147. See also, e.g., *Pleas* v. *Wainwright,* 441 F.2d 56, 57 (5th Cir. 1971); *Byrd* v. *Hopper,* 402 F. Supp. 787, 788 (N.D. Ga. 1975); *United States ex rel. Birch* v. *Fay,* 190 F. Supp. 105, 107 (S.D.N.Y. 1961).

This Court has enunciated the *Cupp* standard in reviewing jury instructions given in federal trials, e.g. *United States* v. *Park, supra; Boyd* v. *United States, supra,* although not limited by the narrower principles governing federal intervention in state convictions. See *Donnelly* v. *DeChristoforo, supra,* 416 U.S at 642; *Cupp,* 414 U.S. at 145-146. The court below had applied the rule with regard to its own appeals before the case at bar reached review, e.g., *United States* v. *Evans, supra,* 484 F. 2d at 1187-1188; *United States* v. *Andreadis,* 366 F. 2d 423, 434 (2d Cir. 1966), and has continued to use the *Cupp* standard since it decided the instant case. E.g. *United States* v. *Magnano,* —— F. 2d —— (2d Cir. September 7, 1976) (Slip Op. 5471, 5477-5480). Certainly state convictions cannot be measured by any stricter test on collateral federal review.*

The failure of the Court of Appeals to properly evaluate the jury charge at issue not only violated the man-

* Cf. *Henderson* v. *Morgan,* —— U.S.——, 49 L. Ed. 2d 108, 119 (1976) (*Rehnquist,* J., dissenting) (". . . certainly no more stringent a standard could be applied as a matter of constitutional law on federal habeas review of state convictions [than in federal cases]").

date of *Cupp* but also undermined the fundamental fairness standard governing all habeas corpus review. Twice in recent terms this Court has reemphasized that not every trial error which might invoke the exercise of an appellate court's supervisory powers correspondingly constitutes a violation of the fundamental fairness standard. *Donnelly* v. *DeChristoforo, supra,* 416 U.S. at 642-643; *Cupp,* 414 U.S. at 145-146. In *Cupp,* this Court carefully noted that while the challenged presumption-of-truthfulness charge had been uniformly condemned, the federal courts had been exercising their supervisory powers over the trial courts in reversing convictions and prohibiting use of the instruction. *Id.* However, it is insufficient for federal review of state jury charges that the instruction be merely erroneous, undesirable, or even uniformly condemned; the narrower test of due process prevails in evaluating the instruction. *Id.*

The theory propounded by the court below to justify its conclusion that the alleged error reached constitutional dimensions actually works to undermine the fundamental fairness standard governing habeas review. The Court reasoned that when a trial court incompletely instructs on an element of the crime, that element is not before the jury for a determination beyond a reasonable doubt; accordingly, the Court said, the defendant is deprived of his right to have the reasonable doubt standard applied to each element of the crime before conviction (A. 112, 116-117).

This is a nebulous proposition which permits evasion of the fundamental fairness criterion. Under this theory any merely erroneous or confusing jury instruction which could not pierce the due process standard of *Lisenba* v. *California, supra,* can be struck down on the theory that its inadequacy infringes on the proof beyond a reasonable doubt requirement. The decision of the court below opens the doors of the federal habeas courts to hundreds of state prisoners who can now claim that the charge in their trials

contained an incomplete or inadequate instruction on a material element of the crime, and that accordingly, that element of the crime was not properly before the jury for a finding beyond a reasonable doubt. That few of these petitioners might prevail is of little moment to the federal courts who must hear and decide the cases, or to the state attorneys who must read the transcripts and file a response. Cf. *Schaefer* v. *Leone*, 443 F. 2d 182, 184 (2d Cir.), *cert. den.* 404 U.S. 939 (1971).

Principles governing application of the Due Process Clause and habeas corpus review mandate that the alleged error at Kibbe's trial be analyzed in light of the entire proceeding. Had the Court of Appeals properly applied this standard, it could only have concluded that respondent Kibbe received a fundamentally fair trial. Accordingly, the judgment of the court below should be reversed.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, November 26, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A .HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
of Counsel

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1906

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

v.

BARRY WARREN KIBBE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

SHEILA GINSBERG,
WILLIAM E. HELLERSTEIN,
PHYLIS SKLOOT BAMBERGER
THE LEGAL AID SOCIETY
FEDERAL DEFENDER
SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorneys for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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Edgerton, *Legal Cause*, 72 U. Pa. L. Rev. 211 (1924) 23
2 Hale, THE HISTORY OF THE COMMON LAW (5th ed 1794) 15
LaFave & Scott, CRIMINAL LAW (1972) 23
Perkins, CRIMINAL LAW (1969) 19,21,22,23
1 Wharton, CRIMINAL LAW AND PROCEDURE (1957) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1906

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

v.

BARRY WARREN KIBBE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the court of appeals correctly found that the failure to instruct the jury on a critical and complex element of a murder charge deprived respondent of his right to a trial in accordance with due process standards.

STATEMENT

I.

PROCEDURAL BACKGROUND

On November 30, 1971, respondent was convicted after a jury trial in Monroe County Court of murder [N.Y. Penal Law §125.25(2) (McKinney 1975)], robbery in the second degree [N.Y. Penal Law §160.10 (McKinney 1975)], and grand larceny in the third degree [N.Y. Penal Law §155.30(5) (McKinney 1975)]. He was sentenced to concurrent terms of 15 years to life imprisonment on the murder conviction; five to 15 years on the robbery; and an indeterminate term of up to four years on the grand larceny conviction.[1]

II.

THE TRIAL

George Stafford died as the result of injuries he sustained when he was hit by a speeding truck driven by Michael Blake (670[2]). Respondent and his co-defendant, Roy Krall, were charged with Stafford's murder pursuant to N.Y. Penal Law §125.25, which provides in pertinent part:

[1] The habeas corpus relief granted below does not involve respondent's custody pursuant to the robbery and larceny convictions, but affects only that restraint which flows from the conviction for murder. *Peyton* v. *Rowe*, 391 U.S. 54 (1968).

[2] Numerals in parentheses refer to pages of the trial transcript. Respondent has filed a copy of the transcript with the Clerk of the Court.

> A person is guilty of murder in the second degree when:
>
> * * *
>
> 2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person. . . .

A. The Prosecution Case

On December 30, 1970, at approximately 10:10 p.m., Michael Blake, then a junior at the Rochester Institute of Technology, was driving his 1965 half-ton Chevrolet pickup truck 50 miles per hour – 10 miles over the speed limit – on East River Road near Rochester, New York (A.47, 53[3]). The night was clear and the road, a two-lane, two-directional roadway, was dry (A.47, 48). Blake, who was familiar with the road because he had driven it twice weekly during the prior year and a half, described it as lightly trafficked (A.49).

As Blake proceeded north on East River Road, he passed two cars coming south. The first of these signaled to Blake by flashing its headlights. Ignoring the signal, Blake did not reduce his speed. After the cars passed, Blake saw George Stafford sitting in the middle of the northbound lane with his hands in the air. Stafford was 100 to 200 feet away when Blake first saw him. Nonetheless, Blake did not apply his brakes or attempt to avoid hitting Stafford by swerving either to the left into the southbound lane – no cars were approaching in that lane – or to the right onto the shoulder of the road (A. 49).

[3] Numerals in parentheses preceded by "A" refer to pages of the Appendix submitted to the Court.

The truck hit Stafford still traveling at full speed. According to Blake, he simply did not have time to react so as to avoid or diminish the impact. After hitting Stafford, the truck dragged Stafford's body approximately 400 feet,[4] Blake thought, and then continued on some distance until Blake could bring the truck to a complete stop (A. 47-49). Blake then turned the vehicle around and drove south in the northbound lane until he reached Stafford's body. He testified that when he saw Stafford, his pants were around his ankles and his shirt was pulled up around his chest.

The spot where Stafford was fatally injured[5] was approximately one-quarter mile north of the East River Road and Bailey Road intersection and one-quarter mile south of an open Sunoco gas station at the junction of River Meadow Road and East River Road (A. 49-50, 54-56). Stafford's shoes were discovered at the side of the road near the point of impact (A. 60).

The events of the evening, leading up to the time Stafford was left somewhere on the shoulder of East River Road, began when respondent and Krall met Stafford at Nick and Corky's Bar in Rochester, New York (720). According to the bartender, Stafford had been drinking heavily and was looking for a ride to Canandaigua. Some time between 8:30 and 9:30 p.m., after the bartender had refused to serve Stafford any more drinks or to cash a $100 bill for him, Stafford left the bar in the company of respondent and Krall[6] (720-724).

[4] According to the medical examiner, the body showed "skid marks" that could have been caused by dragging (A. 58).

[5] En route to the hospital, the ambulance carrying Stafford collided with another vehicle and was rendered inoperable. Some 10 minutes later, a second ambulance transported Stafford, who was by then barely alive, to the hospital (633-634).

[6] The bartender remembered that both Kibbe and Krall had been drinking, too (724).

Through the combined custodial statements respondent and Krall gave to the police the day after the incident, it was revealed that the two agreed to drive Stafford to Canandaigua; that before they left Rochester they stopped at two other bars, one of which agreed to serve them; and that, while en route to Canandaigua, Stafford changed his mind and decided that he wanted to return to Rochester (833-854). Toward that end, Krall, who was driving, turned north on East River Road. During this part of the trip, respondent demanded that Stafford give him his money, and the latter complied. Although respondent slapped Stafford and, according to Krall, they "wrestled" a bit, no weapons were used in this exchange (827). At one point, Stafford took off his boots and lowered his trousers to show that he had no more money (A. 62).

After this episode, according to Krall's statement, Stafford saw a store and lights on the south side of the road and asked that respondent and Krall let him out of the car (828). Krall stopped the car and Stafford got out on the passenger side and was left on the shoulder of the road[7] (853-854). At the time Stafford got out of the car, he had pulled his trousers back up to his waist, but had not put on his boots (A. 62). When respondent realized that Stafford had forgotten his jacket as well as his boots, respondent removed them from the car and placed them on the ground next to Stafford (A. 61).[8]

[7] In this regard, the statements were fundamentally inconsistent with the State's theory of culpability. According to that theory, Stafford had been abandoned on an isolated part of the roadway, one-quarter mile from the Sunoco station, close to the spot where he was hit (677-684).

[8] While this jacket was never recovered, Chief Deputy Blodgett, the officer who examined the scene of the accident, admitted that he did not check the area around the River Meadow Road intersection and the gas station to determine whether Stafford had been there (700). Stafford's personal papers and eyeglasses were recovered from Kibbe's car (708).

According to his own statement, respondent told Stafford to get to the gas station so that he would not freeze (A. 61).

B. The Defense Case

Roy Krall[9] testified for the defense. He related how he and respondent, who had spent the evening drinking at Nick and Corky's, agreed to drive Stafford to Canandaigua (1012, 1014). Respondent and Krall sat in the front seat of the car and Stafford sat in the back (1016). On the way to Canandaigua, Stafford changed his mind and decided to return to Rochester. When Krall turned the car around in response to this request, it was approximately 9:20 or 9:25 p.m. (1017).

According to Krall, it was shortly thereafter that respondent slapped Stafford and asked for his money (1017). Stafford complied. Then, as the car approached the lighted East River Road and River Meadow Road intersection, at which the gas station and a delicatessen were located, Stafford asked to get out. Krall estimated that the spot where Stafford alighted from the car was about 75 feet from the delicatessen which, like the gas station, was on the southbound side of the roadway (A. 66, 64-65). Respondent told Stafford to get there so that he wouldn't freeze, and then Krall and respondent drove away (1067). Krall specifically denied that Stafford had been left one-quarter of a mile from the River Meadow Road intersection (1064).

[9]Krall was 47 years old at the time of the trial and had no prior criminal record (1008, 1024).

C. The Challenge to the Element of Causation

Out of the presence of the jury, trial counsel moved, at the close of the prosecutor's case, and again after the defense rested, for a judgment of acquittal, on the ground that the State had failed to establish causation[10] (A. 29-33, 40). Specifically, counsel argued that respondent and Krall could not "anticipate" the injury to Stafford because they had deposited him at his request near the open and lighted gas station and delicatessen and had left him on the shoulder of the road. Injury resulted only because Stafford positioned himself in the middle of the road and the truck driver, who was speeding, did not attempt to reduce his speed or avoid hitting Stafford. The motions were denied (A. 39, 40).

In summation, defense counsel argued that it was not reasonable on these facts to find that respondent or Krall would "anticipate" the injury to Stafford (A. 68-70). Counsel made these arguments, however, only after reaffirming what the trial judge had already told the jury in his preliminary instructions: that it was the judge alone who would instruct the jury on the law[11] (A. 69-71).

The prosecutor, in his summation, addressed the question of causation, saying, *inter alia*:

[10]In pretrial motions counsel had, on similar grounds, sought to have the murder count dismissed, arguing that the connection between respondent's conduct and the injury to Stafford was "too attenuated" to establish causation (A. 24-25, 27-28).

[11]In his preliminary instructions, the judge cautioned:

> . . . I will charge you or instruct you on the law. . . .
>
> * * *
>
> As I will explain to you in detail in my charge as jurors in the case, you are the sole judges of the facts. I am the sole judge of the law. You must accept the law as I give it to you without hesitation or reservation even if you privately disagree with me.
>
> (A. 41-42).

> . . . Sure, the death, the most immediate, the most preceeding, the most direct cause of Mr. Stafford's death was the motor vehicle, the truck driven by Mr. Blake that hit him right square, the middle of the grill . . . Sure, that's the most direct cause of death. But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there.
>
> (A. 76).

D. The Charge[12]

Reiterating that it was for the court to instruct the jury on the law, the trial judge defined such terms as "felonious," "knowing," "depraved," "indifference," "reckless," and "grave" (A. 83, 89-90). Nowhere did he define "causation," nor did he refer to concepts of superseding cause or foreseeability. Nowhere did he specifically direct that conviction required a finding that respondent "caused" Stafford's death. While the word "caused" appears in the statute, which the judge read to the jury, the judge reminded the jurors immediately thereafter that he had already provided all the definitions they needed to comprehend the statute: "I think I defined for you the different words used in that section" (A. 91).[13]

[12]The entire charge appears in the Appendix at A.77-97.

[13]Trial counsel neglected to object to the failure to instruct on causation.

III.

STATE APPELLATE PROCEEDINGS

The Appellate Division considered, *sua sponte*, the deficiency in the charge, but concluded, over a strong dissent,[14] that while the charge was lacking in detail,

> [i]n our opinion the charge together with language of the statutes and indictment and the evidence were sufficient to inform the jury on this subject and reversal of the judgments is not required in the interest of justice.

People v. *Kibbe*, 41 A.D. 2d 228, 230 (4th Dep't 1973).

On the ground that unobjected to errors are outside the constitutional and statutory limitations of its jurisdiction, the New York Court of Appeals declined

[14]The dissent explored the fundamental nature of the defects in the charge and the necessary effect on the result of the trial, commenting:

> The insufficiency of the charge deprived these defendants of their fundamental right to a fair trial insofar as these indictments charge them with murder. . . .
>
> * * *
>
> . . . The trial court's instruction on all the elements of the crimes charged occupies only about seven pages of the printed record and contains no direction on the issue of causation. . . .
>
> * * *
>
> . . . In the instant case, the jury, under proper instruction, could have concluded that the victim's death by an automobile was a remote and intervening cause. There are no statutory provisions dealing with intervening causes – nor is civil case law relevant in this context. The issue of causation should have been submitted to the jury in order for it to decide whether it would be unjust to hold these appellants liable as murderers for the chain of events which actually occurred. . . .

People v. *Kibbe*, 41 A.D.2d 228, 230-232 (4th Dep't 1973) (dissenting opinion).

to consider the error in the charge on the merits. *People* v. *Kibbe*, 35 N.Y.2d 407, 414 (1974).

IV.

FEDERAL COURT PROCEEDINGS

The United States District Court for the Northern District of New York (Foley, J.) dismissed the *pro se* petition for writ of habeas corpus on the ground, among others, that the errors in the charge were not cognizable in a federal habeas corpus proceeding (A. 21).

The United States Court of Appeals for the Second Circuit reversed the district court and granted the petition, one judge dissenting. The majority (Lumbard, J.) held:

> The bizarre circumstances that prompted Kibbe's apprehension and conviction for murder present one of those rare cases in which a habeas corpus petition pursuant to 28 U.S.C. §2254 genuinely puts at issue the guilt or innocence of the accused. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250-75, 93 S. Ct. 2041, 2059-72, 36 L.Ed.2d 854, 876-890 (1973) (Powell, J., concurring); *Rolls* v. *Manson*, 503 F.2d 391, 494-99 (2d Cir. 1974) (Lumbard, J., concurring). We hold that the trial judge's instructions permitted the jury, in its fact-finding process, to disregard Kibbe's colorable claim that, as to the murder charge, his actions had not caused the death of a decedent and thus violated Kibbe's constitutional right to have every

> element of the crime with which he was charged proven beyond a reasonable doubt. (A. 105-106).[15]

SUMMARY OF ARGUMENT

The court of appeals held that the trial judge's failure to instruct on causation violated due process in that it

[15]Not before the Court is the *sua sponte* holding of the court of appeals that the absence of objection to the charge did not constitute a deliberate by-pass. Unanimous on this point, the court below found that the entire thrust of the defense case had been to challenge the proof of causation, and consequently, counsel's failure to object could be attributed only to inadvertence. *Fay* v. *Noia*, 372 U.S. 391 (1963) (A. 109-112).

The petition for writ of certiorari did not raise this issue, and petitioner has now affirmatively acknowledged in his brief to the Court that there is no procedural impediment to respondent's habeas corpus claim (Petitioner's Brief, n. at 8-9). While the State does not contest the validity of the Second Circuit's conclusion, the State's position is that, since the State Appellate Division has considered the merits of the issue, there is no by-pass, and it is not open to the federal courts to deny relief on the grounds of waiver. *Fay* v. *Noia*, *supra*, 372 U.S. at 439; *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 n.9 (1975); see also *Warden* v. *Hayden*, 387 U.S. 294, 297 n.3 (1967).

Moreover, by choosing not to present the waiver issue at any time throughout the proceedings in the federal courts, petitioner has abandoned all right to have the Court consider the by-pass issue. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Dorszynski* v. *United States*, 418 U.S. 424, 431 n.7 (1974). In any event, without merit is the argument made by the Monroe County District Attorney that the failure to object at trial precluded consideration of the error on appeal to the state courts and should preclude review here (*Amicus* Brief at 5-6). This argument simply fails to take into account the plenary jurisdiction of New York State's intermediate appellate court [N.Y. Crim. Proc. Law §470.15(1) and (6)(a) (McKinney 1971)] as well as the dispositive fact that, in this case, the Appellate Division actually considered the error in the charge on the merits. *People* v. *Kibbe*, 41 A.D.2d 228, 230 (4th Dep't 1973).

removed that essential and contested element from the jury's deliberations and thereby allowed conviction without the requisite finding of each element of the crime beyond a reasonable doubt. The State acknowledges that the charge was materially deficient, but contends that the error was ameliorated by the summations of counsel and the reading of the statute.

The State's argument ignores the requirement, inherent in the right to a jury trial, that the judge instruct on the law. In this case the judge failed to explain a complex legal concept. Moreover, his explicit and repeated caution to the jury that he, alone, would provide instruction on the law prevented the jury from looking to counsel to supply what the judge omitted. The arguments of counsel were of no assistance in any event, since defense counsel and the prosecutor presented sharply conflicting theories of causation, and what the prosecutor argued was legally incorrect.

Causation was a bitterly contested issue at trial, and the prejudice in this case is that the jury, without instruction on concepts of independent intervening cause, superseding cause, and foreseeability, was without guidance to resolve the dispute. As the court of appeals found, the danger here is that the jury may well have convicted despite acceptance of facts which legally negated causation.

ARGUMENT

THE COURT OF APPEALS CORRECTLY FOUND THAT THE FAILURE TO INSTRUCT THE JURY ON A CRITICAL AND COMPLEX ELEMENT OF A MURDER CHARGE DEPRIVED RESPONDENT OF HIS RIGHT TO A TRIAL IN ACCORDANCE WITH DUE PROCESS STANDARDS.

Petitioner challenges the decision of the court of appeals that the absence of instruction on a critical and complex element of the crime deprived respondent of his due process right to have the jury determine that element beyond a reasonable doubt. The court below found that the failure to instruct on "causation," in light of respondent's colorable claim that he had not caused the death of George Stafford, made this case one of those "rare" habeas corpus proceedings which genuinely put in issue the guilt or innocence of an accused. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250-275 (1973) (Powell, J., concurring). Perusal of the entire 1,300 page trial record convinced the majority of the court of appeals that the deficiency in the charge left the jury so ignorant of the prerequisites of "legal cause" that respondent may well have been convicted despite the jury's acceptance of the defense case.

I.

Due process mandates that the fact-finding process in a criminal trial meet minimum standards of accuracy. *In re Winship*, 397 U.S. 358, 361-364 (1970). In an attempt to reduce the margin of error in critical factual determinations, and thus protect against unjustified convictions, the Constitution requires not only that the

prosecution meet its burden of proving [*Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Speiser* v. *Randall*, 357 U.S. 513 (1958)] each and every element of the crime [*Vachon* v. *New Hampshire*, 414 U.S. 478, 480 (1974)] beyond a reasonable doubt (*In re Winship*, *supra*, 397 U.S. at 364), but also that the fact-finder actually pass on the sufficiency of the evidence. *Henderson* v. *Morgan*, 96 S. Ct. 2253, 2260 (1976) (White, J., concurring).

> . . . It should hardly need saying that a judgment of conviction cannot be entered against a defendant no matter how strong the evidence is against him, unless that evidence has been presented to a jury (or a judge, if a jury is waived) and unless the jury finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt. It cannot be "harmless error" wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged. . . . *Id.*, 96 S. Ct. at 2260.

To enable jurors to meet their fact-finding obligation, the trial judge must instruct them on the law and provide guidance for their analysis of the evidence as it relates to the crime charged. The judge's obligation to instruct the jurors inheres in the very right to a jury trial. *Bollenbach* v. *United States*, 326 U.S. 607, 615 (1946); *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95 (1931); *Patton* v. *United States*, 281 U.S. 276, 288-289 (1930); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14 (1899); *United States* v. *England*, 347 F.2d 425, 430 (7th Cir. 1975) (rehearing *en banc* denied); *United States* v. *Noble*, 155 F.2d 315, 317 (3d Cir. 1946).

> "Trial by jury" in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men . . . but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law. . . . *Capital Traction Co.* v. *Hof*, *supra*, 174 U.S. at 13-14.

Lord Hale, in his treatise on the common law, extolled the virtues of a jury trial largely because of the active superintendence and guidance of the trial judge:

> Another excellency of this trial is this: that the judge is always present at the time of the evidence given in it. Herein he is able, in matters of law emerging upon the evidence, to direct them, and also, in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen. And thus, as the jury assist the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact whereof the jury are the judges. . . .[Jury trial] has the advantage of the judge's observation, attention, and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury.

2 Hale, THE HISTORY OF THE COMMON LAW 147, 156 (5th ed. 1794).

Indeed, the Court has held that the jury's ability to perform its function is dependent upon the discharge of the judge's duty to provide essential guidance through "a lucid statement of the relevant legal criteria." *Bollenbach* v. *United States*, *supra*, 326 U.S. at 612.

The trial judge in this case failed completely to provide the required instructions. Nowhere in the charge is there the explicit direction, mandated by the penal law provision, that a conviction for murder requires a finding that respondent's actions "caused" the death. N.Y. Penal Law §125.25(2) (McKinney

1975). Nor is the legal concept of causation ever defined. Analysis of the remainder of the charge convinced the court below that nothing that followed the omissions mitigated the deficiency; indeed, what did appear was found to have aggravated the error. For example, the definitions of "depraved," "indifference," "human life," "reckless," and "grave," the other terms in the statute, highlighted the absence of any definition of causation, and suggested its irrelevance to the deliberations (A. 113). In this context, the subsequent caveat accompanying the recitation of the statute – that all the operative terms had already been defined – could function only to convey the mistaken impression that causation was not in the case.[16]

Based on the extent of the deficiency in the charge and the complexity of the element omitted, the court of appeals was compelled to conclude that the charge was void of instruction on causation. And when, as here, the error is one of total omission, there is no room for conjecture about what the jury understood from conflicting or ambiguous instructions. In the absence of any judicial direction, the jury simply had no way of knowing that causation was an element for their determination.

This error was particularly prejudicial here. This "bizarre" case, as the court of appeals characterized it (A. 105), is dramatically distinct from the usual situation in criminal cases, where the causal relationship is so clear and direct as not to be in issue: for example,

[16]This misconception was no doubt reinforced, the court of appeals found, in the brief instruction on manslaughter which made passing reference to "cause," but emphasized the element of "recklessness," implying again that causation could be assumed while recklessness was still to be determined (A. 113 n.5).

conviction for murder when the defendant intentionally slew the victim, or conviction for arson when the defendant put a lighted match to the building. Here, on these "singular" facts (A. 112), the causal connection was sharply contested, and its resolution was determinative of the outcome of the murder charge. In this context, the court of appeals found that the failure of the judge's charge to provide any instruction on causation precluded the jury's consideration of that pivotal element of the crime and violated respondent's right to due process. *Screws* v. *United States*, 325 U.S. 91, 106-107 (1945); *United States* v. *Singleton*, 532 F.2d 199, 206-207 (2d Cir. 1976); *United States* v. *Howard*, 506 F.2d 1131 (2d Cir. 1974); *United States* v. *Small*, 472 F.2d 818, 819 (3d Cir. 1972); *United States* v. *England*, *supra*, 347 F.2d at 430; *United States* v. *Noble*, *supra*, 155 F.2d at 316-317; see also *Mullaney* v. *Wilbur*, *supra*, 421 U.S. at 705-706 (Rehnquist, J., concurring); *Cool* v. *United States*, 409 U.S. 100 (1972); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403-404 (1966); *cf. Barnes* v. *United States*, 412 U.S. 837 (1973); *Turner* v. *United States*, 396 U.S. 398, 419 (1970); *Leary* v. *United States*, 395 U.S. 6, 36 (1969) (direction to find an essential fact by means of faulty thought process is violative of due process).[17]

[17]The error is so fundamental to the fairness of the proceeding and to the defendant's constitutional right to a jury trial that it mandates reversal of the conviction, despite the absence of objection by counsel. *United States* v. *Singleton*, 532 F.2d 199, 207 (2d Cir. 1976); *United States* v. *Howard*, 506 F.2d 1131, 1134 (2d Cir. 1974); *United States* v. *Clark*, 475 F.2d 240, 248-251 (2d Cir. 1973); *United States* v. *Small*, 472 F.2d 818, 819 (3d Cir. 1972). This would be so even were counsel affirmatively to agree to the deficient charge. *United States* v. *Bosch*, 505 F.2d 78, 79-82 (5th Cir. 1974).

> If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt.
>
> *United States* v. *Clark*, *supra*, 475 F.2d at 248.

at 248.

II.

Petitioner acknowledges, as he obviously must, that an error in a jury instruction can violate due process (Petitioner's Brief at 10-11), and that the instruction here was deficient. However, the major thrust of petitioner's challenge to the decision below is that the deficiencies in the charge were compensated for by arguments of counsel. The court of appeals considered this theory and properly rejected it (A. 113 n.5).[18]

In the instant case, the jury was specifically and repeatedly cautioned by the trial judge, as well as by counsel, that the judge alone would instruct on the law and the jury had to accept the law as the judge explained it.[19] So cautioned, the jurors were in no position to look to counsel for legal guidance, even assuming they were aware of the defects in the judge's charge. Moreover, assistance by counsel was not a possibility here, since each side argued different and conflicting legal theories.[20] At best, the jurors would be

[18]Of course, the arguments of counsel are important – in fact, constitutionally mandated [*Herring* v. *New York*, 422 U.S. 853 (1975)] – but it does not follow, *ipso facto*, that they supplant the judge's charge. Just as the judge cannot substitute for counsel, counsel cannot substitute for the judge.

[19]This warning was initially given in the judge's preliminary instructions (A. 41, 42), and was repeated by him in his main charge (A. 83), as well as by counsel in his summation (A. 69, 71).

[20]The prosecutor urged the jury simply to determine responsibility by a *sine qua non* test: "[W]ould this man be dead had it not been for the acts of these two defendants? And I submit to you members of the jury, that the acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there. . . ." (A. 76). In contrast, defense counsel argued that respondent and his co-defendant were not responsibile since they did not "perceive" the risk and could not be expected to anticipate that Blake would be driving over the speed limit and that Stafford would place himself in the middle of a lane of oncoming traffic (A. 68, 70).

confused as to which theory was correct. See *Andres* v. *United States*, 333 U.S. 740, 765-766 (1948) (Frankfurter, J., concurring). Certainly, it ill behooves petitioner to argue that the prosecutor's summation, in which he argued to the jurors an erroneous and misleading theory of law, provided sufficient guidance.[21]

The weakness of petitioner's argument is illustrated by the fact that in none of the cases upon which he relies are the arguments of counsel found to be adequate remedy for deficiencies in the judge's charge. See *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 148-149 (1973); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). In each of these cases, the Court found corrections for the claimed errors within the confines of the charge itself.

In fact, *Cupp* v. *Naughten*, *supra*, upon which petitioner places his primary reliance, is demonstrative only of the principle that a charge to the jury can be self-correcting. In *Cupp*, the defendant challenged an instruction on the presumption of truthfulness, claiming that the charge violated the presumption of innocence and reduced the prosecutor's burden of proof. In rejecting this claim, the Court noted that the charge contained complete and accurate statements on the presumption as well as the burden of proof, and the only question presented was whether one erroneous statement, which by its own language was not in conflict, nonetheless impliedly nullified the remainder of the instruction that was correct. The Court then

[21]Of course, in the context of the facts of this case, the "but for" test is wholly insufficient to resolve the question of causation. Perkins, CRIMINAL LAW at 722-723 (1969); see *infra* at 20-23.

refused to grant relief on an "error" which, only as a matter of "abstract" logic, "tangentially . . . impinged" on the defendant's rights. *Cupp* v. *Naughten, supra,* 414 U.S. at 148.

In contrast, the charge in this case contained no corrective statements to neutralize the error of omission. Significantly, the gap did not pertain to matters of "abstract" logic, but instead to the essence of the jurors' function: determination of the facts necessary to convict.

Nonetheless, indulging for the moment petitioner's hypothesis that the jury ignored the omissions in the charge and, undaunted, perceived the importance of finding causation, the deficiencies in the charge were still fatal to the deliberations and the hypothesis fails to aid petitioner's case. The court of appeals noted that the concept of legal cause is extremely complex, requiring "that fine distinctions be made," for example, between "intervening" and "supervening" cause (A. 114). Unfortunately, the jury of laymen had no way of appreciating this complexity. Absent direction from the trial judge, the jurors were left to conclude, as the prosecutor indeed argued they should, that respondent was guilty of murder if, but for his act of abandoning Stafford on East River Road, Stafford would not have died.

While a finding that respondent's conduct was a cause *sine qua non* of Stafford's death is relevant to analysis of the causation problems this case presents, it is the beginning, not the end, of the inquiry. Stafford was killed not when respondent left him on the shoulder of the road, but when, some 40 minutes later,

Blake's truck, an independent intervening force,[22] struck him.[23]

Here, the determination of whether respondent's conduct was a sufficiently direct cause of Stafford's death to make him criminally liable required analysis and application of the concept, beyond the ken of a jury functioning without specific instructions, that respondent's liability could be precluded by an independent superseding cause.[24] *Bush* v. *Commonwealth,* 78 Ky. 268, 270-272 (1880); 1 Wharton, CRIMINAL LAW AND PROCEDURE §200 (1957).[25] The court of appeals held that controlling questions are "whether the ultimate result was foreseeable to the original actor and whether the victim failed to do something easily within his grasp that would have extricated him from danger" (A. 115-116); 1 Wharton,

[22]An independent intervening cause is defined as "one which operates upon a condition produced by an antecedent, but is in no sense a consequence thereof." Perkins, CRIMINAL LAW, *supra,* at 722.

[23]On the prosecutor's theory of liability, an innocent motorist who discharges a hitchhiker subsequently killed in a traffic accident has caused the latter's death.

[24]This concept was lost on the prosecutor, who revealed in his summation (A. 76) the failure to distinguish between dependent intervening causes, which cannot be superseding [*State* v. *Pell,* 140 Iowa 655, 119 N.W. 154, 158 (1909); see also *Warren* v. *State,* 3 Div. 874, 25 So.2d 51, 53 (Ala. 1946)] and independent intervening causes, which can be. Perkins, CRIMINAL LAW, *supra,* at 723.

[25]In *Bush,* the victim died of scarlet fever contracted from a doctor who was called to minister to the gunshot wounds inflicted by the defendant. Although the defendant's action was a *causa sine qua non* of the death by disease, the Kentucky Court of Appeals held that the jury could find that the disease was the supervening cause, excusing the defendant's liability.

CRIMINAL LAW AND PROCEDURE, *supra*, §200; Perkins, CRIMINAL LAW, at 725-727 (1969).

The circumstances surrounding respondent's actions are susceptible to a finding that the injury that eventually befell Stafford was not foreseeable. There was evidence at trial that respondent left Stafford, at the latter's request,[26] not more than 75 feet from an open and lighted gas station and store.[27] The roadway, which was two lanes wide, was described as lightly trafficked.[28] Stafford was deposited on the shoulder of the road and told by respondent to get to the gas station.

Significantly, Stafford was not injured on the side of the road where he had been left. He was struck by Michael Blake's truck because, in part, he placed himself in an upright position in the center of the northbound lane of traffic. In addition, Stafford was hit because Blake was driving faster than the speed limit allowed. Moreover, Blake had failed to heed a clear signal from an oncoming motorist warning him to slow down. Finally, although the night was clear, the road dry, and Blake, who was familiar with the road, had approximately 200 feet in which to react, he simply failed to do so.

[26]This is certainly evidence that Stafford, despite his inebriated condition, was alert enough to perceive a place of safety and that respondent could reasonably believe that Stafford was capable of getting to it.

[27]When Stafford left the car, he was wearing his pants and a shirt, and respondent gave him his shoes and jacket. Stafford's subsequent state of undress, as described by Blake, was clearly the result of Stafford's being dragged by the truck (A. 52-53).

[28]Indeed, the road was so lightly trafficked that Blake, the truck driver who fatally injured Stafford, felt secure in returning to the spot where he had hit Stafford by driving south in the northbound lane.

Certainly respondent was entitled to have the jurors evaluate the foreseeability of injury in light of both Stafford's conduct[29] and Blake's. LaFave & Scott, CRIMINAL LAW, 257-263 (1972). This is especially true in light of the defense argument that respondent had left Stafford near the open gas station and that Stafford had chosen to walk in the opposite direction.[30]

[29]While usually the contributory negligence of the victim is not to be considered on the question of criminal causation, where that negligence is a substantial factor as compared to the actions of the accused, it is not to be disregarded. Perkins, CRIMINAL LAW, *supra*, at 703.

[30]Despite the fact that respondent's action of leaving Stafford on the side of the road subjected him to the danger of exposure or of being hit by a passing vehicle, if, before injury, Stafford had made his way to a position of apparent safety, respondent would not have been legally responsible for Stafford's death. *State* v. *Preslar*, 48 N.C. Rep. 417, 423 (1856); see also Beale, *The Proximate Cause of an Act*, 33 Harv. L. Rev. 633, 651 (1920); Edgerton, *Legal Cause*, 72 U. Pa. L. Rev. 211, 239-240 (1924).

In *State* v. *Preslar*, *supra*, 48 N.C. Rep. 417, the defendant beat his wife severely and turned her out of the house at night. She subsequently died of exposure. However, the evidence in the case established that the wife had made her way safely to her father's home but, for reasons of her own, decided not to enter his house at night and chose instead to sleep outside. The North Carolina Court of Appeals held that because the victim had arrived at a place of safety but did not avail herself of it, the harm caused by the defendant's conduct had come to a halt, and he was therefore not guilty of murder.

This logic applies with equal force to the defense contention in this case that respondent left Stafford near the gas station. If Stafford, for reasons of his own, decided not to seek accessible shelter at the gas station but instead chose to remain on the road where he walked approximately one-quarter of a mile before being hit, respondent's actions were not sufficient cause of Stafford's death.

Based on the unique facts and circumstances in this case, the court of appeals granted the writ because of its concern that the omissions in the instructions permitted the jury to convict despite the belief of evidence which should have resulted in a conclusion that respondent was not guilty of murder. The omissions deprived respondent of his due process right to a fair trial. *In re Winship, supra*, 397 U.S. at 364.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

SHEILA GINSBERG,
WILLIAM E. HELLERSTEIN,
PHYLIS SKLOOT BAMBERGER
THE LEGAL AID SOCIETY
FEDERAL DEFENDER
SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorneys for Respondent

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

BARRY WARREN KIBBE,

Respondent.

REPLY BRIEF

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3385

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN ZEISEL COHEN
MARGERY EVANS REIFLER
Assistant Attorneys General
of Counsel

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Respondent.

REPLY BRIEF

A.

Respondent assumes that it would have been to his advantage if the jury had received specific instructions on the "extremely complex" subject of causation—particularly on the issue of foreseeability. The Court of Appeals agreed (A. 116) and, indeed, went a step further, concluding that:

> "Given the proper standard for causation, the jury could have found that Blake had been so reckless as to absolve defendants of legal responsibility for Stafford's death." (A. 114).

The assumption is unwarranted.

Aside from the fact that there is no one "proper" standard for determining causation (Ryu, "Causation in Criminal Law," 106 U. Pa. L. Rev. 773, 803 [1958]), let

alone one that is constitutionally required, it is evident from the record that a more precise instruction as to causation would have focused the issue in such a way as to preclude acquittal. This would have been true whether or not the instruction was framed in accordance with New York law or modelled after LaFave & Scott, Handbook on Criminal Law (1972), the treatise relied upon by the court below.* This may explain why neither defense counsel saw fit to object to the charge on this ground at trial or, subsequently, on appeal.

It is clear that at the time of respondent's trial a defendant was criminally responsible under New York law where an intervening agency was the immediate cause of death unless "death [was] *solely* attributable to the secondary agency, *and not at all induced by the primary one.*" *People* v. *Kane*, 213 N.Y. 260, 270, 107 N.E. 655, 657 (1915) (emphasis supplied). *Accord, People* v. *Stewart*, 40 N Y 2d 692, 697, —— N.E. 2d —— (1976). The New York Court of Appeals reasoned that this conclusion was consistent with the principle that "'every person is to be held to contemplate and to be responsible for the natural consequences of his own acts.'" *People* v. *Kane*, 213 N.Y. at 274.

Significantly, under New York law negligence on the part of the intervening agency is recognized as one of the "natural consequences" of the defendant's acts and such negligence does not excuse the defendant of liability for the homicide (*People* v. *Kane*, 213 N.Y. at 274-277), at least where the defendant's acts were dangerous to life, as respondent has acknowledged his to have been.** See generally Zett, 8 New York Criminal Practice at 69-5 to 69-8 (1976).

* This Court is of course bound by New York's construction of its own criminal laws. *E.g. Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975).

** In the instant case, both respondent and his attorney acknowledged that, under the circumstances, the act of leaving Stafford was dangerous to life, i.e. it was foreseeable that he might freeze to death (Tr. 839, 995).

Therefore, a detailed charge under New York law would have instructed the jury that although (a) respondent's conduct was not the immediate cause of death and (b) the intervening agency was negligent, respondent was nevertheless responsible if it was foreseeable that Stafford might be struck by a car. See *People* v. *Kibbe*, 35 N Y 2d 407, 412-413, 321 N.E. 2d 773, 776 (1974). It is difficult to see how such a charge would have been helpful to respondent. On the contrary, such a charge plainly would been to respondent's disadvantage since it would have deprived him of any opportunity to use Blake's negligence to sway the jury.

Nor would respondent have been in any better position if the trial court had charged the jury in accordance with hornbook law. Thus, assuming that the jury had received explicit instructions, pursuant to LaFave & Scott, about the difference between intervening causes which are coincidences and those which are responses, ultimately the court would have been required to charge that "a coincidence will break the chain of legal cause *unless it was foreseeable*" (LaFave & Scott, p. 258) (emphasis supplied).

In the instant case, the evidence of foreseeability was overwhelming. Moreover, as the Second Circuit itself found, the trial court "scrupulously instructed the jury with respect to the meaning of 'recklessly' . . . [and] 'grave' [risk of death]" (A. 113), both of which go to the issue of foreseeability and both of which the jury, by its verdict, found to be present beyond a reasonable doubt.*

* Respondent, in disputing foreseeability, urges that the road was "lightly trafficked," implying that very few cars used it. (Respondent's Br., p. 22). The evidence at trial is to the contrary. Although respondent understandably denied that there were cars on the road when Stafford was abandoned (Tr. 854), his co-defendant stated there were cars going in both directions at the time, although "there weren't so many" (Tr. 845). In addi-

(footnote continued on following page)

Significantly, LaFave & Scott (p. 260) give as an example of a *foreseeable* coincidence the following:

> "A, with intent to kill B, only wounds B, leaving him lying unconscious in the unlighted road on a dark night, and then C, driving along the road, runs over and kills B. Here C's act is a matter of coincidence rather than a response to what A has done, and thus the question is whether the subsequent events were foreseeable, as they undoubtedly were in the above illustration."

It is true that in a footnote the authors hypothesize that A might not be liable "if C were driving in a *reckless* way" (p. 260 n. 73). However, until the Second Circuit issued its opinion, there was never any suggestion that Blake was *reckless*. Certainly this was not the position of the defense at trial. On the contrary, the defense simply attempted to suggest that Blake was negligent and that this alleged negligence was not a foreseeable consequence of the defendants' actions in abandoning Stafford as they did* (A. 68).

(footnote continued from preceding page)

tion, at the time of the accident there were at least three cars on the road (including Blake's), and Blake testified that afterwards "other passersby were coming along" and he requested help (Tr. 620). Finally, it is relevant that Stafford was not abandoned in the early morning hours when traffic would be at its lightest, but at 9:30 P.M.

In addition, respondent's theory of foreseeability fails to take into account the fact that both defendants acknowledged that it was dark at the spot where they left Stafford (Tr. 846, 854), the fact that Stafford did not have his glasses and the fact that to get to the gas station Stafford would have had to cross the road.

* Respondent continues to rely upon the theory that he is not responsible because he could not precisely foresee the details of the immediate cause of death. The argument is frivolous since the law does not require this degree of clairvoyance. See, e.g., *People* v. *Parody*, 248 App. Div. 269, 271, 289 N.Y.S. 929, 931 (4th Dept. 1936). In the instant case, the question of foreseeability was not whether respondent could have foreseen death by vehicle as it actually happened, but simply whether he could have foreseen death by vehicle.

The difference between recklessness and mere negligence is apparent and the facts of this case do not support any theory of recklessness by Blake under New York law (See *People* v. *Eckert*, 2 NY 2d 126, 130, 138 N.E. 2d 794, 797, 157 N.Y.S. 2d 551, 556 (1956), *People* v. *Bearden*, 290 N.Y. 478, 483, 49 N.E. 2d 785, 788 (1943)) as the defense itself recognized and the Court of Appeals concluded in this case. *People* v. *Kibbe*, 35 N Y 2d at 413. Accordingly, the court below, which failed to draw this distinction, erroneously concluded that the jury "could have found that Blake had been so reckless as to absolve [respondent] of legal responsiiblity" (A. 114). In essence, the Court boot-strapped itself to its theory that respondent may have been prejudiced by the failure of the trial court to elaboarte on the question of causation. See *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948).

B.

Equally without merit is respondent's contention that the jury should have been instructed to take Stafford's conduct into account in evaluating foreseeability since "Stafford, for reasons of his own, may have decided not to seek accessible shelter at the gas station" (Respondent's Br., p. 23). This is not the law in New York. In *People* v. *Kane, supra*, 213 N.Y. at 271-275, 107 N.E. at 658-659, the Court of Appeals cited with approval a number of cases holding that a defendant is responsible if he inflicts a dangerous wound and death ensues, even though it appears that death might have been avoided had the victim acted differently. Therefore, respondent was not entitled to the instruction he now seeks.

In any event, respondent's theory is totally unrealistic, as is the suggestion that Stafford may have been contributorily negligent. It is clear from the record that Stafford was helplessly drunk when he was abandoned and both New York appellate courts so found. Respondent himself acknowledged in his statement to the police that Stafford was "drunk" and fell into a snowbank imme-

diately upon leaving the car (Tr. 853).* Half an hour later, Stafford was hit by Blake in the middle of the lane on the *same* side of the highway as he had been left by respondent. Although Stafford was conscious when Blake saw him, he was apparently unable even to stand up or to appreciate that he was in the road and therefore in danger. In short, the record is devoid of any evidence that Stafford was capable of affecting his fate.

Respondent argues that because Stafford asked to be let out of the car he was "alert enough to perceive a place of safety" and therefore, it was not foreseeable that he would not take advantage of it (Respondent's Br., p. 22). The record does not support this conclusion. Although respondent's co-defendant Krall testified that Stafford asked to be let out at the store" (A. 66), according to respondent's version of what happened, *he* had told Stafford to get out of the car. In any event, Krall's testimony is implausible. At the time Stafford allegedly made his request he was seated in the rear seat of the car on the passenger side and apparently was not wearing his glasses. The two defendants were in the front seat. Both the store and the gas station were on the far side of the road and ahead of the car. In order to let Stafford out 75 feet away from these structures, Stafford would have had to make his request when the car was considerably further away than 75 feet and therefore when he was even less likely to see them. Significantly, this testimony by Krall was the only evidence placing Stafford close to help. All the other evidence indicated that he was left ¼ mile away from the gas station.

C.

Insofar as respondent maintains that the jury may have been misled on the issue of causation because the prosecution argued a "but-for" theory of responsibility, he simply relies upon one statement by the District Attorney and ignores the rest of the prosecution's arguments to the jury

* Respondent specifically denied pushing Stafford.

in summation and throughout the trial. When read in context, it is evident that the "but-for" element of causation—which respondent himself admits is relevant (Respondent's Br., p. 20)—was not unduly emphasized. Certainly it was not error under New York law to bring the "but-for" element to the jury's attention. See *Cox* v. *The People*, 80 N.Y. 500, 516 (1880).

D.

The jury in this case was presented with an undisputed picture of a helplessly drunk, partially undressed man abandoned in near zero weather on a dark, rural highway *at least* 75 feet from the closest lighted structure which was on the opposite side of the road. In the face of this evidence, and without reference to New York law, respondent speculates abstractly about the possible advantage to him of a detailed instruction on causation. This type of speculation does not provide a sufficient basis upon which to set aside a state court criminal conviction, particular when a) New York law is contrary to respondent's theories and b) every court which reviewed the conviction—including the one that set it aside—found that there was sufficient evidence in the record to sustain the conviction of the crime charged.

Dated: New York, New York
February 24, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN ZEISEL COHEN
MARGERY EVANS REIFLER
Assistant Attorneys General
of Counsel

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1906

ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Petitioner,

vs.

BARRY WARREN KIBBE

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Brief of the Monroe County, New York, District Attorney as Amicus Curiae

LAWRENCE T. KURLANDER
District Attorney of Monroe County
201 Hall of Justice
Rochester, New York 14614

Amicus Curiae

Daily Record Corporation
Rochester, New York

(2448)

Spaulding Law Printing
Syracuse, New York

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In The

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No. 75-1906

ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

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vs.

BARRY WARREN KIBBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of the Monroe County, New York, District Attorney as Amicus Curiae

---

The District Attorney of Monroe County, New York files this brief as *amicus curiae* pursuant to United States Supreme Court Rule 42 (4), as chief county legal officer for criminal matters.

Opinions and Orders Below

The judgment of the Court of Appeals granting the writ of *habeas corpus*, the order denying rehearing, the order denying rehearing *en banc* and the decision and order of the District Court for the Northern District of New York are not reported, and are in the appendix filed by the Attorney General of New

York, counsel for petitioner. The decision of the New York Court of Appeals is reported in 35 N.Y. 2d 407, 321 N.E. 2d 773, 362 N.Y.S. 2d 848 (1974), and the decision of the intermediate state appellate court is reported in 41 A.D. 2d 228, 342 N.Y.S. 2d 386 (1973), each sub nom *People vs. Kibbe.*

Jurisdiction

This Court has jurisdiction pursuant to Title 28 U.S.C. §1254 (1). The Court of Appeals judgment reversing the District Court for the Northern District of New York was entered April 8, 1976. The petition for rehearing and rehearing en banc were each denied by the Court of Appeals on May 21, 1976.

Questions Presented

1. May a defendant who does not object to the charge to the jury and who does not raise the issue on appeal nevertheless attack its sufficiency in federal *habeas corpus*?

2. May the sufficiency of a charge to the jury in a state criminal prosecution be reviewed in isolation by a federal court to determine if the defendant was accorded due process?

3. Where a state jury in a criminal case is presented with each element of the offenses alleged, is a federal due process issue raised on grounds the charge was not detailed enough?

Statement of The Case

The facts are set out in detail in the petition of the Attorney General of New York. We include this, somewhat shorter version, for continuity and clarity.

Barry Kibbe and his co-defendant picked up their victim, Stafford, in a bar and offered to drive him home after they had seen him flash a roll of over two hundred dollars. He was

concededly drunk when the trip to his house commenced. They soon turned down a remote county road, robbed him, and left him on the side of the road.

It was a cold winter night, temperature about 4 degrees farenheit. It had snowed, but the roadway had been plowed, and the excess snow formed snowbanks along the sides of the road. A few minutes later, a motorist, returning home, saw Stafford sitting in the roadway. The motorist couldn't react, and struck him. Stafford died that night in the hospital.

It later developed that Stafford's eyeglasses, his coat and his shoes had been removed by defendants and not returned when he was ejected from the car.

Defendants were indicted under New York Penal Law §125.25 (as effective in 1971), which makes it murder when:

> "* * * 2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of a death to another person and thereby causes the death of another person; * * *"

There was no objection to the judge's charge at the conclusion of the case, and the issue of causation was not raised on direct appeal to the state's intermediate appellate court (appellate division of supreme court). The conviction was affirmed, but one judge dissented on grounds the charge did not sufficiently define or explain causation. The Court of Appeals affirmed unanimously, but said the charge could have been more detailed.

Kibbe's subsequent habeas corpus petition was denied by the district court for the northern district of New York. On appeal, the second circuit court of appeals reversed, and granted the writ (one judge dissenting).

Because we have filed this brief without seeing the petitioner's appendix we were not able to make specific references to the

appendix. However, we understand the entire transcript will be before the Court and we hope our general references will not burden the Court.

POINT I

By Failing To Object To The Sufficiency Of The Jury Charge At Trial, Defendant Below Waived The Right To Raise It On Habeas Corpus.

At the conclusion of the state trial, the judge charged the jury on the various aspects of the case, and gave a detailed breakdown of the particular penal statute (Penal Law §125.25). However, he did not specifically define the words "thereby causes" from that statute.

There was no objection to the charge or any requests on that point. The jury subsequently returned for questions, but never asked any question relating to causation.

On appeal from the guilty verdict, defendant did not raise the causation issue either. One judge in the intermediate appellate court (appellate division of state supreme court) voted to reverse in the interests of justice pursuant to N.Y. C.P.L. §470.15-3 (c) because the charge deprived defendant of a fair trial.

In response, the four man majority said:

> "* * * While we agree with the dissenting Justice's statement that the trial court's charge respecting the cause of death was lacking in detail, we do not feel that a new trial should be granted. Appellants have not raised any question as to the sufficiency of the charge on these appeals and their attorneys took no exception and made no request respecting the cause of death at the trial.
>
> In our opinion the charge together with language of the statutes and indictment and the evidence were sufficient to inform the jury on this subject and reversal of the judgment is not required in the interest of justice. * * *" *People v. Kibbe*, 41 A.D.2d at 230.

New York's Court of Appeals also rejected the issue of the jury instruction because:

> "* * * Neither of the defendants took exception or made any request with respect to the charge * * *." *People v. Kibbe*, 35 N.Y. 2d at 413.

A majority of the U.S. court of appeals (second circuit) said the failure to object was not a deliberate by-pass of the state's procedures (slip opinion at 3086), and then held that the jury instruction was so defective as to deprive the defendant of due process.

We contend that defendant did by-pass the state's procedures, and habeas corpus relief should not be available to him.

It is now settled that the federal courts are the final arbiters of federal issues. However, the burden of raising such issue is on defendant in this case. As we were told in *Fay v. Noia*, 372 U.S. 391, discussion at 438, 83 S. Ct. at 848, the federal courts can deny habeas relief if the defendant deliberately fails to raise the federal issue in the state court.

In addition, the thrust of *Fay* was that state procedural rules which deprive a defendant of a right to test a federal issue are not binding on the federal courts if they are merely technical. See also, *Henry v. Mississippi*, 379 U.S. 433, 85 S. Ct. 564.

The state's requirement that the defendant make a timely objection is not merely technical. It is necessary so that corrective action can be taken immediately without the necessity of further proceedings or additional trials. This is not an unreasonable requirement. *Henry v. Mississippi*, 379 U.S. at 448, 85 S. Ct. at 567.

In *U.S. v. Indiviglio*, 352 F. 2d 276 (1965) the second circuit came to the same conclusion *en banc* (discussion at page 280).

The court below correctly pointed out that defendant hoped to convince the jury he didn't cause the victim's death (slip

opinion, at 3087-3089). The court then held that the failure to object was inadvertent and should not be considered a deliberate by-pass. We respectfully urge that reasoning begs the question. The due process issue could only arise if the jury never had the causation issue. Here, that issue was presented to them in the opening statements, the closing statements, and the reading of the statute (Penal law §125.25-2). If defendant thought the charge was deficient it was his burden to raise the issue, because that is when the due process claim arose, if at all — when the charge was given.

This was not a case such as *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, where the factual issues were decided on the wrong legal theory entirely. The charge in this case was correct, but incomplete. While this incompleteness might, in a rare case, deprive defendant of a federal right, we strongly urge that based on the authorities cited above, he has the burden of raising this issue in time for corrective action to be taken, which burden he hasn't met.

We recognize that even though defendant "by-passed" the state's procedures, this Court can still grant habeas relief if the state heard the issue on the merits. E.g. *Lefkowitz v. Newsome*, 420 U.S. fn. 9 at , 95 S. Ct. at 891.

In this case, although the state courts considered the jury instruction as a matter of state procedure, the due process issue was never considered. Each appellate court refused to consider the issue on the merits because defendant had not made timely objection. *People v. Kibbe*, 35 N.Y. 2d 407, discussion at 413-414, and *People v. Kibbe*, 41 A.D.2d 228, discussion at 230.

Defendant failed to raise this issue in time for the state to take corrective action, and he should not be allowed to raise it long after conviction.

POINT II

The Jury Charge Was Sufficient In The Circumstances Of The Case, And In Any Event, No Issue Of Constitutional Dimensions Was Raised By The Charge.

The New York Court of Appeals agreed with the intermediate state court that " * * * the charge might have been more detailed. * * * " *People v. Kibbe*, 35 N.Y. 2d at 414. This alone does not mean that the charge was so deficient as to raise due process claims. In *Kenion v. Gill*, 155 F.2d 176 (D.C. Cir., 1946), the court said at page 178:

> " * * * Mere errors in the charge however, do not constitute sufficient basis for grant of habeas corpus. The inadequacy prerequisite to that writ must consist of the omission of essentials to such an extent that the accused is denied a fair trial in the Constitutional sense. * * * "

Similarly, in *U.S. ex rel. Smith v. Montayne*, 505 F.2d 1355 (2d Cir., 1974) the court said at page 1359:

> " * * * Whether or not the jury charge under consideration here is reversible as a matter of state law, the alleged errors are not of constitutional dimension. Defendant received a full and fair hearing and the trial judge's charge did not deprive defendant of his fundamental right to due process of law. It should be noted in addition that defendant's counsel did not request a specific charge, nor did he make objection to the judge's charge on any of the points currently before this court. * * * "

This Court told us in *Cupp v. Naughton*, 414 U.S. 141, 94 S. Ct. 396 (1973) that a jury instruction cannot be viewed in isolation, but must be examined in context of the entire case. Discussion at 414 U.S. 146-147, 94 S. Ct. 400.

The accused here had a fair trial per the holdings of *Cupp* and *Kenion*, since it is clear from the entire charge as well as the opening and closing remarks of the parties what the issues were. In order to find a due process violation, the court of appeals had

to view the omission in isolation, in conflict with the instruction in *Cupp*.

If the trial is viewed as a whole, defendant had a fair trial and was deprived of no rights. The jury instruction was complete and correct except that the portion dealing with causation was not sufficiently detailed. This does not create *ipso facto* a due process violation. A different issue might have arisen if defendant had objected to the charge, and had his objection overruled. But this didn't happen.

If our argument under point one herein is not persuasive, and this Court reviews the case on the merits, we urge the Court reverse the court of appeals and reinstate the conviction because there is no Constitutional defect requiring reversal of the conviction.

Conclusion

If the jury instruction is examined as a whole together with the openings of counsel, their closing remarks, and the other instruction given by the judge during the trial, it is clear that there was no due process violation.

In addition, by failing to make a timely objection to the charge, defendants prevented the court from taking corrective action. Since defendant never raised a due process issue in the state courts, the federal courts should not review that issue in habeas corpus, especially since the state courts also did not consider the due process issue.

Defendant had a fair trial, the jury understood the issues they were to decide, and the jury instruction did not give them any misinformation, or create any confusion as to their duty. The conviction should be reinstated.

Respectfully submitted,

LAWRENCE T. KURLANDER
District Attorney
of Monroe County,
Amicus Curiae
201 Hall of Justice
Rochester, N.Y. 14614

Melvin Bressler, Esq.
Raymond E. Cornelius, Esq.
Lawrence T. Kurlander, Esq.
of Counsel